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Title 16. Crimes and Offenses (Chapters 1—6)

Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2013 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 29, 2013. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 29, 2013.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2013 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2013 supplement pamphlets and in the bound volumes of the Code.

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VOLUME 14

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CHAPTER 1

GENERAL PROVISIONS

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General Consideration

Term “property.” — Taxpayers were not entitled to a theft loss under 26 U.S.C.S. § 165(e) with respect to a decline in value of publicly traded stock, as a theft by taking did not occur under O.C.G.A. § 16-8-2 because a corporation did not unlawfully take or appropriate any property from the taxpayer, and there was no evidence of any intention by the corporation or its executives to deprive the taxpayer of the property at issue. Although corporate stock, which was in the taxpayer’s control after he exercised his stock options, subsequently declined in value, there was no evidence that the corporate executives had any specific intent with regard to the taxpayer to take or appropriate his stock by devaluation or by any other means; rather, the goal of the corporation, including its later-convicted executives, was to increase the value of the stock, including any stock owned and controlled by the taxpayer. *Schroerlucke v. United States*, 100 Fed. Cl. 584 (Fed. Cl. 2011).

False swearing constituted a felony. — Defendant was not entitled to relief from defendant’s sentence for false swearing, in violation of O.C.G.A. § 21-2-565, because the rule of lenity did not apply in that there was no uncertainty as to the applicable sentence for the crime, and the imposition of a five-year sentence was appropriate and within the sentencing

range, under O.C.G.A. § 16-10-71, for the offense, which constituted a felony under O.C.G.A. § 16-1-3. *Hogan v. State*, 316 Ga. App. 708, 730 S.E.2d 178 (2012).

Cited in *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011); *Wells v. State*, 313 Ga. App. 528, 722 S.E.2d 133 (2012); *State v. Ogilvie*, 292 Ga. 6, 734 S.E.2d 50 (2012).

Public Place

Jail is not a public place. — Defendant’s conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a “public place” as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). *Singletary v. State*, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

Prosecution

Indictment charging involuntary manslaughter by simple battery sufficient. — Indictment charging the defendant with involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a) was not void because the factual allegations in the indictment sufficiently described the offense of involuntary manslaughter in the commission of the unlawful act of simple battery. *Morris v. State*, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

16-1-4. When conduct constitutes a crime; power of court to punish contempt or enforce orders, civil judgments, and decrees.

JUDICIAL DECISIONS

Criminal contempt conviction reversed. — Defendant’s criminal contempt conviction was reversed as the trial court relied on another court’s ex parte immunity grant in ordering the defendant to testify and neither court made a finding that the defendant’s testimony was “necessary to the public interest” as required

by former O.C.G.A. § 24-9-28 (see now O.C.G.A. § 24-5-507); the state had to grant a valid immunity as broad in scope as the privilege it replaced and to show the applicability of that state immunity to the witness. In re Long, 276 Ga. App. 306, 623 S.E.2d 181 (2005).

16-1-6. Conviction for lesser included offenses.

JUDICIAL DECISIONS

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- GENERAL CONSIDERATION
- ARMED ROBBERY
- ASSAULT
- CONTROLLED SUBSTANCES
- KIDNAPPING
- MURDER
- RAPE
- CHILD MOLESTATION
- OTHER OFFENSES INVOLVING CHILDREN
- MISCELLANEOUS CRIMES

General Consideration

Cited in State v. Wilson, No. A12A1122, 2012 Ga. App. LEXIS 793 (Sept. 25, 2012).

Armed Robbery

Separate convictions for armed robbery and aggravated assault were barred, etc.

Defendants’ robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was “contained within” the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate

serious bodily injury. Washington v. State, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Defendant’s conviction for aggravated assault merged into the defendant’s conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Assault

Aggravated assault merged into aggravated battery.

Defendant’s aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim’s hand and

one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the assault required proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge into aggravated battery. — Crimes did not merge legally or factually because aggravated assault required proof that the defendant assaulted the victim using a deadly weapon, aggravated battery required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless, and kidnapping required asportation of the victim. The offenses were distinct with each requiring proof of a fact which the others did not. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Aggravated assault and kidnapping. — Crimes did not merge legally or factually because aggravated assault required proof that the defendant assaulted the victim using a deadly weapon, aggravated battery required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless, and kidnapping required asportation of the victim. The offenses were distinct with each requiring proof of a fact which the others did not. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault and possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. *Mason v. State*, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Controlled Substances

Imposition of separate trafficking sentences proper. — Trial court did not err under O.C.G.A. §§ 16-1-6(2) and 16-1-7(a)(1) by sentencing the defendant separately for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, and trafficking in ecstasy, in violation of O.C.G.A. § 16-13-31.1, when the substance which was found in the defendant's vehicle tested positive for both methamphetamine and ecstasy as there was no evidence that chemical compounds or elements were shared between the drugs. *Ahmad v. State*, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Kidnapping

Aggravated assault and kidnapping.

Trial court did not err in declining to merge kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Kidnapping and false imprisonment.

Trial court did not err in allowing the jury to consider the lesser included offense of false imprisonment after granting a directed verdict on the kidnapping charges against defendant because false imprisonment was a lesser included offense of kidnapping, and the indictment against defendant contained all the essential elements related to false imprisonment. *Martinez v. State*, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

Murder

Aggravated assault and malice murder.

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim

because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Indictment charging involuntary manslaughter by simple battery sufficient. — Indictment charging the defendant with involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a) was not void because the factual allegations in the indictment sufficiently described the offense of involuntary manslaughter in the commission of the unlawful act of simple battery. *Morris v. State*, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

Aggravated battery merged with malice murder.

Evidence of a three-year-old child's injuries and death was sufficient to support the defendant's conviction for malice murder, felony murder, aggravated assault, and aggravated battery; however, the defendant's conviction for aggravated battery based on the fracture of the child's ribs should have been merged into the defendant's conviction for murder under O.C.G.A. § 16-1-6(b). *Soilberry v. State*, 289 Ga. 770, 716 S.E.2d 162 (2011).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder, as both convictions were established by the same conduct. *Hernandez v. State*, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Rape

Statutory rape not lesser included offense of forcible rape. — Trial court did not err in failing to instruct the jury that statutory rape was a lesser included offense of forcible rape because a conviction of statutory rape required proof that

the victim was under the age of consent, while a conviction of rape required proof of force, regardless of the victim's age. *Stuart v. State*, 318 Ga. App. 839, 734 S.E.2d 814 (2012).

Merger of attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Child Molestation

Child molestation and aggravated sexual battery, etc.

Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. *Gaston v. State*, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

Child molestation and cruelty to children. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16

years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires, O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Other Offenses Involving Children

Deprivation of minor and cruelty to children. — Trial court did not err in failing to merge the defendant's misdemeanor convictions for contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), with the defendant's corresponding felony convictions for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), pursuant to the "required evidence" test, the offenses did not merge as a matter of law; the offenses of cruelty to children in the second degree and contributing to the deprivation of a minor each have at least one essential element that the other does not: causing the child

cruel or excessive physical or mental pain and wilfully failing to provide the child with the proper care necessary for his or her health, respectively. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Miscellaneous Crimes

Harassing phone calls and aggravated stalking. — Trial court did not err by failing to give the defendant's requested charges on the lesser included offenses of harassing phone calls and violation of a temporary protective order because the state's evidence was sufficient to establish all of the elements of the aggravated stalking offenses as indicted; under the evidence, either the defendant was guilty of the indicted offenses or the defendant was guilty of no offense whatsoever. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

16-1-7. Multiple prosecutions for same conduct.

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- 3. CRIMES AGAINST PROPERTY
- 4. APPLICATION TO OTHER CRIMES

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- 1. IN GENERAL
- 2. CRIMES AGAINST THE PERSON
- 4. APPLICATION TO OTHER CRIMES

SEVERANCE

- 3. SENTENCING

General Consideration

Attachment of jeopardy.

Trial court erred in holding that jeopardy had not attached on the previous charges filed against the defendant due to a mistrial because the defendant was placed in jeopardy when the jury was sworn in the first trial. *Herrington v. State*, 315 Ga. App. 101, 726 S.E.2d 625 (2012).

Offenses not arising from same transaction.

Appellate court found that the court was compelled to uphold the trial court's denial of the defendant's double jeopardy plea in bar on the basis that the defendant did not affirmatively show the prosecutor actually knew of the other crimes when the prosecutor prosecuted the first offense. *Banks v. State*, 320 Ga. App. 98, 739 S.E.2d 414 (2013).

Included Crimes

2. Crimes Against the Person

Armed robbery as included offense of malice murder.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Aggravated assault. — Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with intent to murder merged for sentencing because both counts of the indictment alleged that the defendant committed aggravated assault by slashing the victim's neck; although one count alleged that the assault was done with a deadly weapon and the other alleged that it was done with the intent to commit murder, O.C.G.A. § 16-5-21(a)(1) and (a)(2), the counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck and, thus, the counts merely charged the same act of aggravated assault being committed in two of the multiple ways set out in O.C.G.A. § 16-3-21. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated battery and aggravated assault. — Defendant's aggravated battery convictions did not merge because the counts of the indictment were predicated on different conduct; in order to prove one count of the indictment, the state had to show that the victim threw bleach in the victim's eyes, and in order to prove another count of the indictment, the state had to prove that the victim's finger was rendered useless because the finger was repeatedly struck with a hammer. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Separate judgments of conviction and sentences for aggravated assault, O.C.G.A. § 16-5-21(a)(2), and aggravated battery, O.C.G.A. § 16-5-24(a), were authorized because the evidence authorized a finding that the defendant committed an initial aggravated assault and, after a

deliberate interval, committed an aggravated battery in a different location and on a different part of the victim's body; because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually. *Brockington v. State*, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Aggravated assault with deadly weapon and with object. — Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with an object, device, or instrument did not merge because the counts of the indictment requiring the state to prove that the defendant slashed the victim's neck with a sharp-edged instrument, hit the victim with a hammer and wrapped a cord around the victim's neck with the intent to murder were based on different conduct and merger of those convictions was not required. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault and malice murder.

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Trial court erred when the court failed to merge the defendant's aggravated assault conviction into the defendant's conviction for felony murder because there

was no evidence of a deliberate interval separating the infliction of any non-fatal wounds and any fatal wounds; instead, the undisputed evidence was that the wounds were delivered in quick succession. *Sears v. State*, 292 Ga. 64, 734 S.E.2d 345 (2012).

Aggravated assault and armed robbery.

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. *Hall v. State*, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Aggravated assault and aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand, and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious in-

jury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault and kidnapping.

Trial court did not err in declining to merge kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Child molestation and aggravated sexual battery. — Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. *Gaston v. State*, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

Child molestation and cruelty to children. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon

or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Burglary and felony murder with burglary as predicate felony. — While the evidence was sufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of felony murder, with burglary as the predicate felony, armed robbery, burglary, possession of a firearm during the commission of a crime, and misdemeanor possession of marijuana, the defendant's conviction for burglary could not stand because the burglary conviction served as the predicate felony for the felony murder conviction; thus, it was error to sentence the defendant for both felony murder and burglary. *Young v. State*, 291 Ga. 627, 732 S.E.2d 269 (2012).

Malice murder and felony murder. — Trial court erred by sentencing defendant to concurrent sentences of life imprisonment for malice murder and felony murder because there was only a single victim; thus, the defendant could not be convicted and sentenced for both murder counts. *Gamble v. State*, 291 Ga. 581, 731 S.E.2d 758 (2012).

3. Crimes Against Property

Three vehicle collisions arising out of erratic driving arose from the same conduct. — Pursuant to O.C.G.A. § 16-1-7, a defendant could not be prosecuted for DUI and other traffic citations by a city after the defendant had already pled guilty to charges issued by the state patrol arising out of the same course of conduct. Although the defendant struck three different cars, there was no break in the action of the defendant's erratic driving. *Dean v. State*, 309 Ga. App. 459, 711 S.E.2d 42 (2011).

4. Application to Other Crimes

DUI and criminal trespass separate transactions. — Motion in *autrefois* convict and plea of former jeopardy was properly denied because the offense of DUI did not arise from the same transaction as the criminal trespass; the defendant was ar-

rested on a warrant for criminal trespass at the residence of a live-in girlfriend, while the defendant was arrested for DUI near, but not at, the residence. Thus, the incidents were separate transactions. *Johns v. State*, 319 Ga. App. 718, 738 S.E.2d 304 (2013).

Joint Prosecution of Offenses

1. In General

Same conduct and same jurisdiction not shown. — Defendant's conviction for driving under the influence (DUI) less safe was affirmed because the defendant's actions in the Fulton County hit and run incident and the defendant's actions in the Gwinnett County DUI less-safe incident were neither the same transaction nor the same conduct as contemplated by O.C.G.A. § 16-1-7(a). *Hassard v. State*, 319 Ga. App. 708, 738 S.E.2d 293 (2013).

Prosecutor's knowledge of offenses.

State was prohibited by O.C.G.A. § 16-1-7(b) from adding new charges to the indictment because the charges in the previous two-count indictment were for different offenses than the ones the state added to the re-indictment, and all of the crimes were actually known to the prosecutor when the defendant commenced the first prosecution. *Herrington v. State*, 315 Ga. App. 101, 726 S.E.2d 625 (2012).

2. Crimes Against the Person

Aggravated assault and murder. — Trial court erred by convicting the defendant of aggravated assault and an associated weapons possession conviction in addition to murder because, with regard to the stabbing death of the victim, there was no evidence of any interval, deliberate or otherwise, separating the infliction of the victim's non-fatal wounds from the infliction of the wounds that killed the victim. *Reddings v. State*, 292 Ga. 364, 738 S.E.2d 49 (2013).

Felony murder and felony criminal attempt to possess cocaine. — Separate judgment of conviction and sentence for criminal attempt to possess cocaine was vacated because after the jury found the defendant guilty of felony murder while in the commission of the felony of

criminal attempt to possess cocaine, and also of the felony of criminal attempt to possess cocaine, the defendant was sentenced on each charge, but the defendant could not be sentenced on both felony murder and the underlying felony when found guilty of both. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

4. Application to Other Crimes

Unauthorized offers to sell. — Because defendant's argument on appeal was a challenge to defendant's convictions for making 91 unauthorized offers to sell recorded material under O.C.G.A. § 16-8-60(b), and because an O.C.G.A. § 16-1-7(a) motion to correct or modify an illegal sentence was not an appropriate remedy to attack a conviction in a criminal case, the defendant did not properly challenge the convictions; defendant's only recourse was through habeas corpus proceedings. *Rogers v. State*, 314 Ga. App. 398, 724 S.E.2d 417 (2012).

Drug related offenses. — Trial court did not err in failing to merge the counts for attempt to manufacture methamphetamine and possession of ephedrine and pseudoephedrine because the jury could have found different conduct to support each offense; the jury could have found that the defendant assembled metham-

phetamine ingredients with intent to manufacture and that the defendant possessed some part of those ingredients after altering the ingredients. *Taylor v. State*, No. A12A1877, 2013 Ga. App. LEXIS 244 (Mar. 21, 2013).

Severance

3. Sentencing

Separate sentences for drug trafficking offenses. — Trial court did not err under O.C.G.A. §§ 16-1-6(2) and 16-1-7(a)(1) by sentencing the defendant separately for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, and trafficking in ecstasy, in violation of O.C.G.A. § 16-13-31.1, when the substance which was found in the defendant's vehicle tested positive for both methamphetamine and ecstasy as there was no evidence that chemical compounds or elements were shared between the drugs. *Ahmad v. State*, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Only one sentence when only one victim. — Trial court erred in sentencing the defendant to separate terms of life imprisonment for malice murder and felony murder since there was only one victim. *Ward v. State*, No. S13A0420, 2013 Ga. LEXIS 266 (Mar. 18, 2013).

16-1-8. When prosecution barred by former prosecution.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RETRIAL

APPLICATION GENERALLY

General Consideration

Cited in *Gibson v. State*, 319 Ga. App. 627, 737 S.E.2d 728 (2013).

Retrial

No double jeopardy.

Trial court erred in granting the defendant's plea in bar because double jeopardy did not bar a second trial on the same charges since the retrial was granted due to an erroneous evidentiary ruling; the

order granting a new trial did not find the evidence was legally insufficient to sustain the verdict, but instead, the second trial judge granted the new trial based on the original trial court's error in admitting an exhibit to prove that defendant had a prior felony conviction after the defendant had offered to stipulate that the defendant was a convicted felon. *State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

Since the reversal of a defendant's convictions amounted to neither an adjudica-

tion of not guilty nor a finding that the evidence did not authorize the verdict, the defendant's re-indictment and retrial were not barred. *Dryden v. State*, 316 Ga. App. 70, 728 S.E.2d 245 (2012).

Trial court did not err by declaring a mistrial after the first trial and retrying the defendant because the defendant did not show that the defendant raised the doctrine of procedural double jeopardy prior to the second trial. *Riddick v. State*, No. A12A2133, 2013 Ga. App. LEXIS 220 (Mar. 19, 2013).

Effect of reversal for error at trial.

Double jeopardy protection did not bar a second trial on the same charges because the defendant's motion for new trial was granted due to an erroneous evidentiary ruling. *State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

When the actions of a prosecutor cause a mistrial, etc.

Trial court did not err in denying the defendant's plea of former jeopardy because its finding that the prosecution's

question on cross-examination was an unintentional reference to the defendant's right to remain silent was not clearly erroneous; the record contained evidence to support the trial court's finding that the prosecutor's question was not intended to goad the defense into seeking a mistrial. *Demory v. State*, 313 Ga. App. 265, 721 S.E.2d 93 (2011).

Application Generally

State permitted to prove case against defendant.

— Because the defendant's brother was prosecuted in federal court for possession of a cocaine mixture in an apartment, the state was permitted to prove the state's case against the defendant by proof of joint constructive possession; the state did not prosecute the brother for the brother's joint constructive possession of the cocaine mixture in the apartment, but the United States did prosecute the brother in federal court. *Holiman v. State*, 313 Ga. App. 76, 720 S.E.2d 363 (2011).

16-1-12. Restrictions on contingency fee compensation of attorney appointed to represent state in forfeiture action.

(a) In any forfeiture action brought pursuant to this title, an attorney appointed by the Attorney General or district attorney as a special assistant attorney general, special assistant district attorney, or other attorney appointed to represent this state in such forfeiture action shall not be compensated on a contingent basis by a percentage of assets which arise or are realized from such forfeiture action. Such attorneys shall also not be compensated on a contingent basis by an hourly, fixed fee, or other arrangement which is contingent on a successful prosecution of such forfeiture action.

(b) Nothing in this Code section shall be construed as prohibiting or otherwise restricting the Attorney General or a district attorney from appointing special assistants or other attorneys to assist in the prosecution of any action brought pursuant to this title. (Code 1981, § 16-1-12, enacted by Ga. L. 2012, p. 1035, § 2/SB 181.)

Effective date. — This Code section became effective July 1, 2012.

Editor's notes. — Ga. L. 2012, p. 1035, § 3/SB 181, approved by the Governor May 2, 2012, provided that the effective

date of this Code section is July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of effective date provisions that precede the date of approval by the Governor.

CHAPTER 2

CRIMINAL LIABILITY

ARTICLE 1

CULPABILITY

16-2-1. “Crime” defined.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CRIMINAL NEGLIGENCE

General Consideration

Cited in *State v. Ogilvie*, 292 Ga. 6, 734 S.E.2d 50 (2012).

Criminal Negligence

Defendant acted with requisite criminal negligence. — Evidence was sufficient to support the defendant’s conviction for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), be-

cause the evidence authorized a finding that the defendant acted with the requisite criminal negligence under O.C.G.A. §§ 16-2-1(b) and 16-5-70(c) in causing the victim to sustain severe, painful burns to the victim’s body; the state’s expert testified that the victim’s burns were inconsistent with the defendant’s claim that the incident leading to the victim’s injuries was merely accidental. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

16-2-2. Effect of misfortune or accident on guilt.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CULPABLE NEGLECT OR UNLAWFUL ACT

General Consideration

Charge not required where participation in crime denied.

Trial court did not err in refusing to give the defendant’s requested charge on accident under O.C.G.A. § 16-2-2 because the defendant repeatedly denied striking any vehicle in a parking lot. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Failure to charge the jury on the affirmative defense of accident, etc.

In a vehicular homicide case, any error in the trial court’s failure to charge the jury on the law of accident under O.C.G.A.

§ 16-2-2 was waived because the proposed charge was not in the record, and there was no evidence that it was the pattern charge, and the defendant failed to object after the charge was given as required by O.C.G.A. § 17-8-58(a). *Rouen v. State*, 312 Ga. App. 8, 717 S.E.2d 519 (2011).

Instruction on accident. — Appellate court erred in reversing defendant’s conviction for vehicular homicide based on her failure to stop for a pedestrian in a crosswalk because those charges were strict liability offenses to which the accident defense did not apply since it was undisputed she voluntarily drove into the

crosswalk and struck the child. *State v. Ogilvie*, 292 Ga. 6, 734 S.E.2d 50 (2012).

Cited in *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Culpable Neglect or Unlawful Act

Evidence did not raise issue of accident or misfortune.

Trial court did not err in refusing an instruction on the affirmative defense of accident because the defendant admitted going to the service station with the intent

to rob the victim, admitted pointing a loaded gun at the victim, and acted with criminal negligence, rendering the defense of accident inadmissible. *Brockman v. State*, 739 S.E.2d 332, No. S12P1490, 2013 Ga. LEXIS 201 (2013).

Instruction properly refused.

Defendant was not entitled to a jury charge on accident since the accident occurred as the defendant was driving recklessly. *Dryden v. State*, 316 Ga. App. 70, 728 S.E.2d 245 (2012).

16-2-3. Presumption of sound mind and discretion.

JUDICIAL DECISIONS

Directed verdict in competency trial. — Trial court did not err in denying the defendant’s motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant’s competency trial because the evidence on competency was in conflict; even though the defendant’s expert witness opined that the defendant was not competent to stand trial, the state’s expert testified that the defendant was competent to do so. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Competency established. — While the defendant presented expert testimony,

based on the defendant’s performance on various cognitive tests, that the defendant was not competent to stand trial, the finding of competency to stand trial was supported by the testimony of the state’s expert, who opined that the defendant understood the nature and object of the proceedings, had a basic comprehension of the defendant’s own condition in reference to the proceedings, and had the ability to assist counsel in a defense. *Tiegreen v. State*, 314 Ga. App. 860, 726 S.E.2d 468 (2012).

16-2-4. Presumption that acts of sound person willful.

RESEARCH REFERENCES

ALR. — Challenges to pre- and post-conviction restitution under animal post-conviction forfeitures and to cruelty statutes, 70 ALR6th 329.

16-2-6. Intention a question of fact.

JUDICIAL DECISIONS

ANALYSIS

**GENERAL CONSIDERATION
APPLICATION**

General Consideration

Sufficiency of evidence.

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based

upon the defendant’s actions and the defendant’s presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than “merely present” during the commission of

the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. *Cook v. State*, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Cited in *Hickman v. State*, 311 Ga. App. 544, 716 S.E.2d 597 (2011); *Fairwell v. State*, 311 Ga. App. 834, 717 S.E.2d 332 (2011).

Application

Intent to arouse or satisfy sexual desires.

Jury was presented with sufficient evidence to find the defendant guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1) because the testimony of the defendant's former wife regarding what she observed on the night in question, i.e., that the defendant and the victim were asleep together with their underwear pulled down and that she saw what appeared to be fecal matter smeared on the victim's buttocks and the bed sheets, was sufficient for the jury to conclude that the victim's and the defendant's otherwise inexplicable mutual exposure was for the purpose of satisfying the defendant's own sexual desires. *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires, pursuant to O.C.G.A. § 16-2-6. *Obeginski*

v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. 2012).

Intent to assist in possession and sale of marijuana. — There was sufficient evidence of knowledge and intent to assist with or participate in the crime of possession of marijuana with intent to distribute when a defendant drove the defendant's roommate to a location in another county and the roommate brought along a sealed, insulated bag, which the defendant placed in the back compartment of the car. *Able v. State*, 312 Ga. App. 252, 718 S.E.2d 96 (2011).

Intent to make terroristic threats. — Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. *Layne v. State*, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Sufficient intent to kidnap. — Jury was authorized to find that the defendant had the requisite criminal intent from the fact that the defendant approached the victim who the defendant did not know and offered the victim money. Upon approaching the victim, the defendant grabbed the victim, lifted the victim up, and carried the victim away against the victim's will. *Thomas v. State*, 320 Ga. App. 101, 739 S.E.2d 417 (2013).

ARTICLE 2

PARTIES TO CRIMES

16-2-20. When a person is a party to a crime.

Law reviews. — For article, "State v. Jackson and the Explosion of Liability for

Felony Murder," see 62 Mercer L. Rev. 1335 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSPIRACY

AIDING AND ABETTING

APPLICATION

1. IN GENERAL
2. CHILD ABUSE AND NEGLECT
3. DRUG RELATED OFFENSES
4. MURDER OR MANSLAUGHTER
5. OTHER CRIMES AGAINST THE PERSON
6. PROPERTY OFFENSES

General Consideration

Presence and assistance in commission of crime.

Pursuant to O.C.G.A. § 16-2-20, because the defendant was not only present when a robbery was committed, but also actively aided and abetted the robbery's commission and received a portion of the money taken from the victim, the evidence was sufficient to find the defendant guilty of robbery by force beyond a reasonable doubt under O.C.G.A. § 16-8-40(a)(1). *Brown v. State*, 314 Ga. App. 375, 724 S.E.2d 410 (2012).

Cited in *Bryson v. State*, 316 Ga. App. 512, 729 S.E.2d 631 (2012); *Williams v. State*, 316 Ga. App. 821, 730 S.E.2d 541 (2012); *Williams v. State*, 291 Ga. 501, 732 S.E.2d 47 (2012); *Simmons v. State*, 292 Ga. 265, 736 S.E.2d 402 (2013).

Conspiracy

Where conspiracy is shown, etc.

Evidence was sufficient to support codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on her admission that she provided the identifying information of several current and former tenants of the apartment complex she worked at to a third party and, even though she did not know the identity of the other persons involved in the scheme nor the details of the operation, she was concerned in the commission of the crime and intentionally aided or abetted in the commission of the crime by providing the information. *Manhertz v. State*, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

Aiding and Abetting

Evidence sufficient as to aiding and abetting armed robbery.

Defendant's conviction of attempt to commit armed robbery was affirmed because the defendant discussed the attempted armed robbery beforehand with the codefendants, provided part of the disguise for the defendant's sibling, drove the codefendants to the crime scene, was present near the scene of the attempted robbery, and fled the scene after the attempted robbery. *Skipper v. State*, 314 Ga. App. 870, 726 S.E.2d 127 (2012).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) and of child molestation. Evidence was presented that the defendant had prior knowledge of the intended crimes, shared in the intent of the spouse to entice the minor victim to the defendants' home, and was present for the crimes of child molestation. *Dockery v. State*, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to establish that the defendants assaulted the victim with intent to rob, the issue of which the defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both defendants guilty of aggravated assault with intent to rob and of possession of a firearm during

the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. *Clark v. State*, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate the victim's resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. *Zachery v. State*, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Because the driver of a delivery truck was forced at gunpoint by defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40, the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. *Sipplen v. State*, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Sufficient circumstantial evidence supported the defendant's armed robbery conviction because the evidence showed the defendant actively aided and abetted the defendant's codefendant by: (1) driving the codefendant to a crime scene; (2) waiting during the crimes with an intent to use the defendant's car as a getaway car; (3) fleeing the scene with the codefendant; (4) waiting while the codefendant broke into a house; (5) fleeing the house with the codefendant; and (6) having a gunshot wound. *Jones v. State*, 315 Ga. App. 427, 727 S.E.2d 216 (2012).

Planning robbery and driving getaway car, etc.

Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the com-

mission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. *Norman v. State*, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Jury instructions.

There was slight evidence to justify a charge as to parties to the crime as two or more persons could have been involved; it was possible that the defendant acted with an accomplice who fled the scene in a yellow car, while the defendant fled the scene in a green car, because several witnesses claimed to have seen the robber leave in a yellow car, and other witnesses said the perpetrator got into a green car. *Williams v. State*, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Application

1. In General

Possession of firearm during commission of crime.

Jury's verdict of acquittal on an aggravated assault charge and guilty on the charge of possession of a firearm during the commission of a crime was not necessarily inconsistent because the jury was free to reject the defendant's testimony that the defendant did not know the defendant's passenger had a gun and accept the defendant's testimony that the defendant was unaware of the intended robbery. *Morrell v. State*, 313 Ga. App. 443, 721 S.E.2d 643 (2011), cert. denied, No. S12C0800, 2012 Ga. LEXIS 484 (Ga. 2012).

Evidence sufficient to support finding of participation.

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence pre-

sented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. *Harrelson v. State*, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. *Cook v. State*, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Based on the evidence that the defendant drove and deliberately followed the victims and pulled in behind the victims' vehicle, intentionally encouraged the shooter by telling the shooter "you better not let these guys get away, go ahead and handle your business, do what you got to do," and fled with the shooter after the shooting, the jury was authorized to conclude that the defendant was a party to the crimes of aggravated assault and possession of a firearm during the commission of a crime. *Talifero v. State*, 319 Ga. App. 65, 734 S.E.2d 61 (2012).

2. Child Abuse and Neglect

Child cruelty.

Jury was authorized to find that the defendant was a party to the codefen-

dant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

3. Drug Related Offenses

Trafficking in cocaine.

Trial court did not err in convicting the defendant of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) because the jury was authorized to find that the defendant was in joint constructive possession of the cocaine and was a party to the crime pursuant to O.C.G.A. § 16-2-20(a) and (b)(3); the evidence showed that the defendant participated and intentionally aided in the commission of the drug trafficking offense by driving the codefendants and the cocaine to the pre-arranged location for the transaction, warning the codefendants that the principal agent was a police officer and taking possession of the funds used for the transaction. *Valdez v. State*, 310 Ga. App. 274, 712 S.E.2d 656 (2011).

Defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), was supported by sufficient evidence under O.C.G.A. §§ 16-2-20(b)(3) and former 24-4-8 (see now O.C.G.A. § 24-14-8) since the defendant and the codefendant had both made statements regarding the defendant's involvement in the criminal activity, and the police observed the defendant's actions; there was evidence that the defendant was an active participant and a party to the trafficking offense. *Martinez v. State*, 314 Ga. App. 551, 724 S.E.2d 851 (2012).

Evidence was sufficient to support the defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), based on the defendant's participation in a sale of a sufficient amount and purity of cocaine to an undercover agent; although a codefendant con-

ducted the sale directly, the defendant was a party to the sale under O.C.G.A. § 16-2-20(b)(3) since the defendant was in a nearby vehicle that the codefendant went to during the transaction. *McGee v. State*, 316 Ga. App. 661, 730 S.E.2d 131 (2012).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) because the state presented evidence that even if the defendant did not bring the bag of cocaine to an owner's residence, the defendant possessed the cocaine and was a party to the crime of trafficking in cocaine under O.C.G.A. § 16-2-20. *Kegler v. State*, 317 Ga. App. 427, 731 S.E.2d 111 (2012).

Delivery and distribution of marijuana.

Evidence that a defendant participated in a plan for the delivery of a package containing 12 pounds of marijuana to a residence, along with digital scales, a marijuana grinder, and plastic baggies at the residence, and the defendant's admission that the marijuana was the defendant's, was sufficient to convict the defendant as a party to possession of marijuana with intent to distribute, trafficking in marijuana, and possession of marijuana, pursuant to O.C.G.A. § 16-2-20. *Salinas v. State*, 313 Ga. App. 720, 722 S.E.2d 432 (2012).

Witness was not accomplice in drug transaction. — Defendant's convictions were not based on insufficient evidence when a witness gave uncorroborated testimony because the witness was not the defendant's accomplice as: (1) the defendant only asked the witness how to make a fake brick of cocaine; and (2) nothing showed the witness advised, encouraged, or counseled the defendant to commit a crime, under O.C.G.A. § 16-2-20(b)(4), or that the witness intended to participate in a crime. *Williams v. State*, 289 Ga. 672, 715 S.E.2d 76 (2011).

Jury instructions misstated law of party to a crime for marijuana possession. — Trial court's instructions on "mere association" and "mere presence" with regard to charging a defendant as a party to a crime under O.C.G.A.

§ 16-2-20(a) were misstatements of the law and also directly conflicted with other closely related instructions, and were harmful error requiring reversal of the defendant's convictions for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1). *Able v. State*, 312 Ga. App. 252, 718 S.E.2d 96 (2011).

4. Murder or Manslaughter

Party to murder.

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

Evidence sufficient for participation in murder.

Based on the evidence, a juror could infer from the conduct of the defendant before and at the time of the shooting that the defendant advised, encouraged, and counseled the shooter to fire the fatal shot. The evidence was sufficient to authorize a juror to find beyond a reasonable doubt that the defendant was a party to the crimes of which the defendant was convicted. *Brown v. State*, 291 Ga. 887, 734 S.E.2d 41 (2012).

5. Other Crimes Against the Person

Evidence sufficient for participation in aggravated assault.

Sufficient evidence existed to support the defendant's convictions for armed robbery and aggravated assault based on the victims' testimony that guns were used in the commission of the crimes, the testimony of the defendant's girlfriend and the presence of a cell phone found near the scene of the crimes, and the victims identifying the defendant's accent was suffi-

cient for the jury to infer that the defendant was an armed participant in the crimes. *Jordan v. State*, No. A12A2286, 2013 Ga. App. LEXIS 163 (Mar. 11, 2013).

6. Property Offenses

Evidence sufficient to support robbery conviction.

Trial court did not err in finding that similar transaction evidence was relevant and admissible because the evidence showed that the defendant was involved in the planning and/or execution of each of the similar transactions pursuant to O.C.G.A. § 16-2-20, even if the defendant was not the actual perpetrator of the crime; given that the defendant was identified as an active participant in individual crimes that were part of this continuing criminal enterprise, and that the defendant's possession of a ring stolen from a car salesperson further demonstrated the involvement in the crime spree, the jury was authorized to find that the defendant committed the independent offenses or acts as either an actual perpetrator or as a party to the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Party to armed robbery.

Evidence was sufficient to support the defendant's conviction for armed robbery because an accomplice testified to committing a series of armed robberies and that the defendant had participated by select-

ing the stores to rob, supplying the gun, acting as the getaway driver, and receiving part of the stolen money; law enforcement officers testified that the accomplice implicated the defendant during an interrogation, and officers found items of clothing matching those worn by the armed robber in the defendant's hotel room. *Williams v. State*, 314 Ga. App. 840, 726 S.E.2d 66 (2012).

Party to the crime of entering an automobile with intent to commit theft. — Evidence was sufficient to convict a defendant of theft in violation of O.C.G.A. § 16-8-18 as a party to the crime under O.C.G.A. § 16-2-20, given that the defendant drove the defendant's truck to a pharmacy, waited with the truck idling while the defendant's friend got out, smashed a car window, and stole a purse, then drove away with the friend and hid the friend at the defendant's apartment when the police came. *Rinks v. State*, 313 Ga. App. 37, 718 S.E.2d 359 (2011).

Evidence insufficient to support conviction of theft by taking.

Jury was authorized to find from the evidence that the defendant was guilty beyond a reasonable doubt of theft by taking, O.C.G.A. § 16-8-2, as a party to the crime under O.C.G.A. § 16-2-20 because evidence that another house cleaner could have taken the money would not necessarily have precluded a finding of the defendant's guilt. *Cookston v. State*, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

16-2-21. Prosecution of parties who did not directly commit the crime.

JUDICIAL DECISIONS

Jury instruction supported by evidence.

There was slight evidence to justify a charge as to parties to the crime as two or more persons could have been involved; it was possible that the defendant acted with an accomplice who fled the scene in a yellow car, while the defendant fled the scene in a green car, because several witnesses claimed to have seen the robber leave in a yellow car, and other witnesses said the perpetrator got into a green car.

Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Evidence sufficient to support conviction.

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than

“merely present” during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. *Cook v. State*, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Jury was authorized to find that the defendant was a party to the codefendant’s crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim’s testimony showed that the defendant was present during the codefendant’s beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Evidence that the defendant drove the car and remained there while the defendant’s boyfriend took the victim’s backpack at gunpoint was sufficient for the jury to find that the defendant aided and abetted the boyfriend. *Teele v. State*, 733 S.E.2d 395, No. A12A1649, 2012 Ga. App. LEXIS 857 (2012).

Sufficient evidence existed to support the defendant’s conviction for armed robbery

based on the fact that while the defendant may not have had a gun, the defendant drove the car and remained in the vehicle while the codefendant took the victim’s backpack at gunpoint and, after the armed robbery had occurred, the defendant appeared to wait for the codefendant to return to the vehicle before driving away; whether the defendant was a party to the crime and aided and abetted the codefendant was a jury question, and the jury rejected the defendant’s argument that the defendant had no knowledge of the robbery and was merely driving the car. *Teele v. State*, 319 Ga. App. 448, 738 S.E.2d 277 (2012).

Sufficient evidence supported the defendant’s armed robbery, false imprisonment, aggravated assault, and possession of a firearm during a felony conviction, despite the defendant’s claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant’s accomplice pointed the gun and took the property, the defendant could be convicted through the defendant’s role as a party, under O.C.G.A. § 16-2-21. *Bush v. State*, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Cited in *Jordan v. State*, No. A12A2286, 2013 Ga. App. LEXIS 163 (Mar. 11, 2013).

16-2-22. Criminal responsibility of corporations.

JUDICIAL DECISIONS

Liability for theft. — Corporation could only be criminally liable for theft in Georgia pursuant to O.C.G.A. § 16-2-22(a)(2) for crimes by an officer or official who was acting within the scope of his employment on behalf of the corpora-

tion, as the applicable theft statutes did not contain language that clearly indicated a legislative purpose to impose liability on a corporation. *Schroerlucke v. United States*, 100 Fed. Cl. 584 (Fed. Cl. 2011).

CHAPTER 3

DEFENSES TO CRIMINAL PROSECUTIONS

ARTICLE 1

RESPONSIBILITY

16-3-2. Mental capacity; insanity.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Jury charges correctly stating law.

Instruction on self-defense did not result in reversible error because the trial court fully and adequately charged and recharged on the issue of self-defense, including the statutory language “reasonably believes” in O.C.G.A. § 16-3-21(a), and on the state’s burden to prove beyond a reasonable doubt that the defendant was not justified. *Hill v. State*, 290 Ga. 493, 722 S.E.2d 708 (2012).

Defendant failed to prove insanity at the time of the crime.

There was evidence from which a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant was insane at the time of the crime because the state presented the testimony of a forensic psychologist that the defendant’s efforts to clean up the blood and hide the body indicated that the defendant knew the wrongfulness of the defendant’s actions, that the defendant’s statement to police that the defendant acted in self-defense was a rational motive for the defendant’s escalating fight with the victim, and that there was no evidence that the defendant was delusional at the time of the crimes. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the defendant introduced no evidence of insanity, only lay witness testimony about generalized problems. *McBride v. State*, 314 Ga. App. 725, 725 S.E.2d 844 (2012).

Failure to plead insanity defense.

— Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant’s home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant’s criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. *Layne v. State*, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

16-3-3. Delusional compulsion.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Failure to instruct on justification as necessary component. — Trial court erred in failing to instruct the jury on justification as a necessary component of the delusional compulsion defense. *Woods v. State*, 291 Ga. 804, 733 S.E.2d 730 (2012).

Defendant failed to prove insanity at the time of the crime.

There was evidence from which a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant

was insane at the time of the crime because the state presented the testimony of a forensic psychologist that the defendant's efforts to clean up the blood and hide the body indicated that the defendant knew the wrongfulness of the defendant's actions, that the defendant's statement to police that the defendant acted in self-defense was a rational motive for the defendant's escalating fight with the victim, and that there was no evidence that the defendant was delusional at the time of the crimes. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

16-3-4. Intoxication.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Voluntary drunkenness furnishes no excuse for crime.

Defendant's conviction was affirmed because the evidence showed that the defendant voluntarily consumed alcohol; and the defendant's ability after the night of the incident to recall events from that

evening as evidenced by the defendant's apology to the business owner two days later and by the defendant's testimony at trial, showed that any alteration of the defendant's brain function that night was not more than temporary. *Anderson v. State*, 319 Ga. App. 701, 738 S.E.2d 285 (2013).

16-3-5. Mistake of fact.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURY INSTRUCTIONS

General Consideration

Defendant's belief did not constitute mistake of fact. — Defendant's belief that the victim was not in the trajec-

tory of the bullet when the defendant intentionally fired the weapon at a third party does not constitute the type of mistake of fact that would serve as a defense

to malice murder or other crimes. *Allen v. State*, 290 Ga. 743, 723 S.E.2d 684 (2012).

Cited in *Floyd v. State*, 319 Ga. App. 564, 737 S.E.2d 341 (2013).

Jury Instructions

Charge on mistake of fact warranted. — Because a defendant's evidence that the defendant acted under a misapprehension of fact in entering a house would have authorized the jury to acquit the defendant of burglary under O.C.G.A. § 16-7-1(a), and because the charge that was given did not properly inform the jury about the true nature of the defendant's affirmative defense, the defendant was entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. *Price v. State*, 289 Ga. 459, 712 S.E.2d 828 (2011).

Trial court did not err in refusing to charge mistake of fact, etc.

Trial court did not err in failing to charge the jury on the defense of mistake of fact under O.C.G.A. § 16-3-5 as to the burglary counts of the indictment because the fact that the defendant could have thought that someone lived in the home did not constitute the type of mistake of fact that would serve as a defense to the defendant's unauthorized entry into the

home since the evidence was uncontroverted that the defendant was not invited into the home. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Trial court did not err by failing to give the defendant's requested jury charge on the defense of mistake of fact, pursuant to O.C.G.A. § 16-3-5, because the charge was not authorized by the evidence as the evidence did not show that the defendant was working as a confidential informant at the time when drugs were found in an inventory search of the defendant's vehicle before the impoundment of the vehicle for the defendant not having a driver's license and insurance for the vehicle. *Ahmad v. State*, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Requested instruction should have been given. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court should have provided the jury with a requested instruction on mistake of fact pursuant to O.C.G.A. § 16-3-5, as defendant's knowledge of a plan or intent to rob was a material element of the charge and there was evidence that might have supported defendant's version of events. *Windhom v. State*, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

16-3-6. Affirmative defenses to certain sexual crimes.

Cross references. — Modification of orders of adjudicated delinquent children for sexual crimes, § 15-11-32.

Law reviews. — For article on the 2011 enactment of this Code section, see

28 Ga. St. U.L. Rev. 131 (2011). For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

ARTICLE 2
JUSTIFICATION AND EXCUSE

16-3-20. Justification.

JUDICIAL DECISIONS

ANALYSIS

JURY INSTRUCTION

Jury Instruction

Ineffective assistance not found.

Trial counsel was not ineffective for failing to object to the trial court’s jury charge on justifiable parental discipline, O.C.G.A. § 16-3-20(3), because the trial court was authorized to give a justifiable parental discipline jury charge that was

adequately adjusted to the evidence in the case; because it was for the jury to decide whether or not the codefendant’s conduct caused the victim to suffer cruel or excessive physical pain, any objection to the trial court’s jury charge on justifiable parental discipline would have lacked merit. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

16-3-21. Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURY CHARGE

- 1. IN GENERAL
- 2. CONTENT

APPLICATION

General Consideration

Double jeopardy did not bar retrial.

— Defendant’s acquittal on malice murder charges under O.C.G.A. § 16-5-1(c) did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because the acquittal did not necessarily mean that the defendant acted in self-defense under O.C.G.A. § 16-3-21(a); if the jury did not find that the defendant acted with either express or implied malice, the jury had to acquit the defendant of malice murder. *Roesser v. State*, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Jury Charge

1. In General

Charge that self-defense inapplicable when in process of committing felony.

— Trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that self-defense was inapplicable when the defendant was attempting to commit or was committing a felony because the defendant made an affirmative choice to engage in a dangerous and potentially violent criminal activity when the defendant participated in a drug transaction. *Davis v. State*, 290 Ga. 757, 725 S.E.2d 280 (2012).

Self-defense instruction not warranted.

Trial court did not err by failing to

charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the evidence did not support the giving of the charge; there was no evidence presented at trial that the victim's act of opening the front door was in any way an unlawful entry into or attack upon the victim's mother's house, that the victim opened the door in a violent and tumultuous manner, or that the defendant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by refusing to charge the jury on the affirmative defense of self-defense because the defendant never admitted to the crimes alleged and, in fact, denied even being present during the assault of the victim; therefore, there was no evidence to support the giving of the requested charge. *Ransom v. State*, 318 Ga. App. 764, 734 S.E.2d 761 (2012).

Justification instruction not warranted. — Trial court did not err by declining to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because defendant declined to testify at trial or present any defense witnesses to support a justification defense, and the defendant's cross-examination of the state's witnesses did not reveal any evidence that would support such a defense. *Jackson v. State*, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Charging language of Code section sufficient.

Trial court did not err in charging the jury on self-defense in the language of O.C.G.A. § 16-3-21(b)(3) because assuming that there was no evidence that the defendant was the aggressor, the charge was at most merely irrelevant, being one of a number of stated exceptions to the rule concerning the use of force in self-defense. *Neal v. State*, 290 Ga. 563, 722 S.E.2d 765 (2012).

Lack of evidence to support jury charge on justification.

Defendant's counsel was not ineffective for failing to request jury charges on the excessive use of force or on lack of justification under O.C.G.A. § 16-3-21(b)(1) and (b)(3) because two corrections officers did

not use excessive force as a matter of law in subduing the defendant when, while incarcerated in a county jail, the defendant took two dinner trays, refused to put one back, and fought and choked an officer who took the trays away. *Williams v. State*, 309 Ga. App. 688, 710 S.E.2d 884 (2011).

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the requested charge, which contrasted justification, voluntary manslaughter, and murder, was an inaccurate statement of the law; the definition of "justifiable homicide" contained in the defendant's request was inconsistent with and had been superseded by the current statutory scheme for the affirmative offense of justification; the existence of "reasonable fears" is irrelevant to the consideration of voluntary manslaughter. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. §§ 16-3-21(a) and 16-3-23 because counsel for the defendant characterized the defense as an "imperfect self-defense," a form of voluntary manslaughter that was not recognized in Georgia. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Although the defendant indicated that the defendant believed a civilian code enforcement officer and a police officer were "stealing" the defendant's vehicles, that belief was unfounded because the vehicles were being removed after the defendant failed to clean up property; thus, there was no evidence of any imminent threat of harm to justify the defendant's use of force under O.C.G.A. § 16-3-21(a). *Adcock v. State*, 317 Ga. App. 468, 731 S.E.2d 365 (2012).

Charge on mutual combat not adjusted to the evidence. — Trial court's refusal to give the defendant's requested jury instruction on mutual combat, O.C.G.A. § 16-3-21(b)(3), did not constitute plain error under O.C.G.A. § 17-8-58(b) because a charge on mutual combat was not adjusted to the evidence; there was no evidence of intent to engage in a mutual fight or combat by agreement. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

Trial counsel not ineffective.

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel's performance could not be considered deficient for failure to pursue those defenses. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

2. Content

Defense entitled to jury charge as to retreat.

Trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat under O.C.G.A. § 16-3-23.1 because self-defense, O.C.G.A. § 16-3-21(a), was the defendant's sole defense, and the issue of retreat was squarely placed in issue by the prosecutor's cross-examination of the defendant, by the defendant's explanation of why the defendant did not drive away from the victim, whom the defendant characterized as the aggressor, and by the prosecutor's closing argument; the evidence of the defendant's guilt was not overwhelming, given that the case turned solely on the credibility of the defendant, the victim, and the other witnesses. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Charge fairly represented issue of justification. — Trial court did not err in failing to include certain language in the court's charge on justification because the charge as a whole fairly represented the issue of justification; inasmuch as the charge as a whole was not an incorrect statement of the law, and the charge instructed the jury that the defendant was justified in using self defense against the "imminent use of unlawful force and against great bodily injury", the trial court's omission of the phrase "or to prevent the commission of a forcible felony" did not undermine the legal adequacy of the charge. *Milnavicius v. State*, 290 Ga. 374, 721 S.E.2d 843 (2012).

Defendant not entitled to justification charge.

Based on the evidence supporting the defendant's participation in a felony drug transaction at the time of the fatal shooting of the victim, the trial court was au-

thorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that a person was not justified in using force in defense of self or others if the person was attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; the defendant affirmatively chose to engage in the potentially dangerous and violent criminal business of a felony drug deal before the fatal confrontation with the victim took place. *Smith v. State*, 290 Ga. 768, 723 S.E.2d 915 (2012).

Jury instruction based on domestic violence report statute was error. — Jury charge based on O.C.G.A. § 17-4-20.1(a) and (b) was not supported by the evidence because only one of the two parties involved in a domestic dispute reported the incident to law enforcement, and the error was not harmless because it could have led the jury to conclude that the defendant, who was arrested, was the primary aggressor, and undermined the defense of self-defense, which was not permitted under O.C.G.A. § 16-3-21 if the defendant was the aggressor. *Dean v. State*, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Application

Evidence of victim's alleged violent acts against third parties inadmissible. — Court of appeals erred in reversing the trial court's order refusing to allow the defendant to testify about a previous incident of violence the victim allegedly committed against third parties in support of a justification defense under O.C.G.A. § 16-3-21(a) because the defendant sought to introduce alleged evidence in the form of unsupported assertions by the defendant as to what was in the defendant mind at the time the defendant killed the victim. *State v. Hodges*, 291 Ga. 413, 728 S.E.2d 582 (2012).

Evidence authorized jury to believe that the defendant did not act in self-defense.

Evidence was sufficient to support the defendant's conviction for voluntary manslaughter because the defendant's testimony that the initial shot to the victim's head was an accident and that the defendant kept shooting because the victim threatened to kill the defendant was suf-

ficient to allow the jury to conclude beyond a reasonable doubt that the defendant did not justifiably use deadly force to protect oneself, after the victim already had been shot in the head, from the victim's assault pursuant to O.C.G.A. § 16-3-21(a); or the jury simply could have disbelieved the defendant's claim of self-defense, given the number of gunshots fired. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Evidence was sufficient to enable the jury to find beyond a reasonable doubt that the defendant did not act in self-defense under O.C.G.A. § 16-3-21(a) because, even if the jury accepted the defendant's version of events preceding the shooting of the two victims, the jury was authorized to conclude that, having wrestled control of one of the victim's gun, the defendant used excessive force in shooting the two unarmed victims and/or in continuing to fire at the victims after the victims had fallen to the ground. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Rational jury could find the defendant guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the state disproved the defendant's self-defense claim; the jury was entitled to reject the defendant's version of events, and even if the jury found that the victim threw a bottle at the defendant's car, the jury could have concluded that the defendant struck the victim after any danger had passed and that the defendant's response was excessive. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims engaged in a heated argument, which escalated to preparations for a physical altercation, was suffi-

cient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather simply in self-defense, when the defendant shot an unarmed victim. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Evidence of justification.

As defendant showed a threat of force from the victim and reasonably believed that the defendant needed to defend oneself from a violent attack by the victim that could have caused the defendant great bodily injury, the defendant was justified in using deadly force against the victim to protect the defendant under O.C.G.A. § 16-3-21; consequently, the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2. *State v. Green*, 289 Ga. 802, 716 S.E.2d 194 (2011).

Evidence sufficient to disprove justification defense.

Evidence failed to support the defendant's claim of justification or self-defense although the defendant and the victim engaged in a fight before the defendant shot the victim because the fight had ended at the time the defendant retrieved a gun. *Willis v. State*, 316 Ga. App. 258, 728 S.E.2d 857 (2012).

Victim's violent acts. — Evidence of violent acts committed by the victim against either the defendant or against third parties may be introduced by a criminal defendant claiming justification because the key showing must be that the victim was the aggressor in the fatal encounter. *State v. Hodges*, 291 Ga. 413, 728 S.E.2d 582 (2012).

16-3-23. Use of force in defense of habitation.**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****General Consideration****Jury charge on defense of habitation.**

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. §§ 16-3-21(a) and 16-3-23 because counsel for the defendant characterized the defense as an “imperfect self-defense,” a form of voluntary manslaughter that was not recognized in Georgia. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by failing to give the jury the defendant’s request to charge on the defense of habitation under O.C.G.A. § 16-3-23 because the evidence that the victim was intoxicated and had cursed at the defendant earlier that evening simply did not meet the statutory standard; there was no evidence presented at trial that the victim’s act of opening the front door was in any way an unlawful entry into or attack upon the victim’s mother’s house, that the victim opened the door in a violent and tumultuous manner, or that the defendant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial counsel was not ineffective for failing to request a jury charge on the defense of habitation under O.C.G.A. § 16-3-23(1) because there was no basis for an instruction on defense of habitation; the jury was charged on the law of self-defense, but rejected that defense, and the defendant did not establish how a jury charge on the defense of habitation would have raised a reasonable probability that the outcome of the case would have been different. *Hill v. State*, 290 Ga. 493, 722 S.E.2d 708 (2012).

Although the defendant indicated that the defendant believed a civilian code enforcement officer and a police officer were

“stealing” the defendant’s vehicles, that belief was unfounded because the vehicles were being removed after the defendant failed to clean up property; thus, there was no evidence of an unlawful entry into the defendant’s habitations that would have justified the defendant’s use of force under O.C.G.A. § 16-3-23. *Adcock v. State*, 317 Ga. App. 468, 731 S.E.2d 365 (2012).

Trial testimony did not provide the slight evidence necessary to support an instruction on the defense of habitation because the evidence showed that the defendant exited the van and began fighting after the van stopped, at a time when no attack was even arguably being made on the van. *Andrade v. State*, 319 Ga. App. 75, 733 S.E.2d 474 (2012).

Trial court did not err in failing to charge the jury on the defense of habitation under O.C.G.A. § 16-3-23(2), despite the defendant’s failure to request charge, because it was not the defendant’s sole defense and the omission of the unrequested charge was not clearly harmful as a matter of law. *Barrett v. State*, 292 Ga. 160, 733 S.E.2d 304 (2012).

Counsel was not ineffective for failing to present defense.

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel’s performance could not be considered deficient for failure to pursue those defenses. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err in denying the defendant’s motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was

attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was neces-

sary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

16-3-23.1. No duty to retreat prior to use of force in self-defense.

JUDICIAL DECISIONS

Reversible error in failing to charge jury on lack of duty to retreat.

— Trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat under O.C.G.A. § 16-3-23.1 because self-defense, O.C.G.A. § 16-3-21(a), was the defendant's sole defense, and the issue of retreat was squarely placed in issue by the prosecutor's cross-examination of the defendant, by the defendant's explanation of

why the defendant did not drive away from the victim, whom the defendant characterized as the aggressor, and by the prosecutor's closing argument; the evidence of the defendant's guilt was not overwhelming, given that the case turned solely on the credibility of the defendant, the victim, and the other witnesses. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

16-3-24. Use of force in defense of property other than a habitation.

JUDICIAL DECISIONS

No evidence to support instruction on justification.

— Although the defendant indicated that the defendant believed a civilian code enforcement officer and a police officer were "stealing" the defendant's vehicles, that belief was unfounded because the vehicles were being removed after the defendant failed to

clean up property; thus, there was no evidence of tortious or criminal interference with the defendant's property to justify a jury instruction on the use of force under O.C.G.A. § 16-3-24. *Adcock v. State*, 317 Ga. App. 468, 731 S.E.2d 365 (2012).

16-3-24.1. Habitation and personal property defined.

JUDICIAL DECISIONS

Cited in *Andrade v. State*, 319 Ga. App. 75, 733 S.E.2d 474 (2012).

16-3-24.2. Immunity from prosecution; exception.

JUDICIAL DECISIONS

Immunity properly found.

As defendant showed a threat of force from the victim and reasonably believed that the defendant needed to defend oneself from a violent attack by the victim

that could have caused the defendant great bodily injury, the defendant was justified in using deadly force against the victim to protect the defendant under O.C.G.A. § 16-3-21; consequently, the de-

fendant was immune from prosecution under O.C.G.A. § 16-3-24.2. State v. Green, 289 Ga. 802, 716 S.E.2d 194 (2011).

16-3-25. Entrapment.

JUDICIAL DECISIONS

ANALYSIS

JURY CHARGE

Jury Charge

Charging jury in language of law.

Counsel’s failure to object to the denial of counsel’s request to instruct a jury on the definition of “incitement” in the con-

text of an entrapment instruction was not ineffective assistance because “incitement,” as used in O.C.G.A. § 16-3-25, was a term of common knowledge. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

16-3-26. Coercion.

JUDICIAL DECISIONS

Coercion is no defense, etc.

Trial court did not err by refusing to charge the jury on the defense of coercion under O.C.G.A. § 16-3-26 because the threat of violence to the defendant from a co-defendant did not occur during the crimes but while they were driving to the scene of the robbery. Additionally, the co-defendant walked off for a period of time prior to the crimes and the defendant could have left the scene but did not. Calmes v. State, 312 Ga. App. 769, 719

S.E.2d 516 (2011), cert. denied, No. S12C0538, 2012 Ga. LEXIS 324 (Ga. 2012).

It is for jury to determine whether there was coercion.

Defendant’s claim of duress and coercion, under O.C.G.A. § 16-3-26, did not require reversal of the defendant’s convictions because the jury, being properly charged on this defense, was authorized to reject the defense. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

CHAPTER 4

CRIMINAL ATTEMPT, CONSPIRACY, AND SOLICITATION

16-4-1. Criminal attempt.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION

General Consideration

Sufficient evidence. — Defendant's conviction of criminal attempt to commit burglary was affirmed because, while the defense presented a different theory of events and claimed that defendant did not act with the intent to commit a theft, it was the jury's province to assess witness credibility, resolve the conflicts in the evidence, and determine whether there was a reasonable hypothesis of innocence favorable to defendant. *Anthony v. State*, 317 Ga. App. 807, 732 S.E.2d 845 (2012).

Indictment sufficient. — Trial court did not err by denying defendant's motion for a new trial on the ground that the indictment was defective for failing to allege the essential element of intent to commit a theft because the indictment clearly charged that defendant attempted to commit a burglary, not that he completed the crime. *Coleman v. State*, 318 Ga. App. 478, 735 S.E.2d 788 (2012).

Effective assistance of counsel in attempted rape trial. — Defendant was not prejudiced by trial counsel's failure to object to testimony speculating as to the defendant's state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim's belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Cited in *Simon v. State*, 320 Ga. App. 15, 739 S.E.2d 34 (2013); *Cosmo v. State*, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

Application

Sufficiency of indictment.

Trial court did not err in granting the defendant's special demurrer and dismissing the indictment charging the defendant with attempted child molestation, O.C.G.A. §§ 16-4-1 and 16-6-4, attempted aggravated child molestation, §§ 16-4-1 and 16-6-4(c), and computer pornography, O.C.G.A. § 16-12-100.2(d) because the indictment contained inadequate informa-

tion as to the alleged victim; attempted child molestation, attempted aggravated child molestation, and computer pornography are crimes against a particular person and require the victim to be identified in the indictment, even if the victim was a police officer using a pseudonym. *State v. Grube*, 315 Ga. App. 885, 729 S.E.2d 42 (2012).

Offense of enticing.

Defendant's conviction for criminal attempt to entice a child for indecent purposes, under O.C.G.A. §§ 16-4-1 and 16-6-5(a), was reversed because: (1) the victim's compliance with the defendant's request to send the defendant a naked picture of the victim would not have satisfied the element of asportation since the request did not try to entice the victim to go to another place; (2) without evidence that the defendant tried to move the victim "any place whatsoever," the state did not prove the defendant had the requisite intent to commit the crime of enticing a child and that the defendant took a substantial step toward committing that crime; so (3) the state presented insufficient evidence to prove all elements of the only crime with which the state charged the defendant. *Heard v. State*, 317 Ga. App. 663, 731 S.E.2d 124 (2012).

Sexual offenses with minors initiated over the Internet.

When the defendant was charged with using the Internet to seduce, solicit, lure, or entice a child or a person believed to be a child to commit an illegal sex act, under O.C.G.A. § 16-12-100.2(d)(1), attempted aggravated child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(c), and attempted child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(a), it was not error to deny the defendant's motion for a directed verdict of acquittal, based on entrapment, because the jury's determination that entrapment did not occur was supported by evidence that: (1) the defendant continued communicating with a person the defendant believed to be 14 years old, including having sexually explicit conversations with the person in which the defendant stated the defendant wanted "a lot of oral," after the defendant learned that the person was 14 years old; (2) the defendant discussed with the per-

son how the person could meet the defendant if the person could not drive, inquired whether the person had ever snuck away from home before, and stated that the defendant believed the union would be legal if the defendant were 16 years old, instead of the defendant's actual age; (3) the defendant left the defendant's home of Tennessee to meet a purportedly 14-year-old girl in order to have sex with the person, which the defendant admitted in the defendant's statements to officers; and (4) the defendant brought condoms with the defendant, which the defendant stated were to prevent any "accidents" in the event the defendant was able to have sex with the person. *Millsaps v. State*, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36, was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. *Brown v. State*, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Rule of lenity did not apply. — Trial court did not err in not applying the rule of lenity with regard to defendant's conviction for criminal attempt to commit burglary because the crimes of criminal trespass and criminal attempt to commit a burglary did not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime; thus, the rule of lenity did not apply. *Snow v. State*, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Evidence sufficient for criminal attempt to commit armed robbery.

Victim's testimony that defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt

to commit armed robbery. *Garmon v. State*, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder as both convictions were established by the same conduct. *Hernandez v. State*, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Criminal attempt to commit theft from vehicle.

Defendant's act of repeatedly pulling at a vehicle's door handle in a sorority house parking lot at 2:00 a.m. amounted to more than a mere preparatory act, and was instead an act proximately leading to the consummation of the crime of entering an automobile, supporting the defendant's conviction for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18. *Brown v. State*, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Attempt to hijack a motor vehicle. — Given that a defendant repeatedly stabbed a victim in the throat in a parking lot to attempt to force the victim to get inside the victim's car, the trial court could find that the defendant rejected the car keys when the victim offered the keys because the defendant intended to abscond with both the car and the victim as needed to prove attempted hijacking of a motor vehicle under O.C.G.A. §§ 16-4-1 and 16-5-44.1(b). *Hickman v. State*, 311 Ga. App. 544, 716 S.E.2d 597 (2011).

Similar transaction evidence admissible. — Based on the defendant's position that the defendant was not involved with a methamphetamine laboratory, as well as the similarity of the defendant's prior drug crime with criminal attempt to manufacture methamphetamine, the trial court did not abuse the court's discretion in admitting the evidence of the defendant's prior attempts to manufacture methamphetamine for the purpose of showing the defendant's bent of mind and course of conduct; the trial court was authorized to find that the probative value of the similar transaction evidence outweighed its prejudicial effect, and the trial court provided jury instructions that limited consideration of the similar trans-

action evidence to the appropriate purposes and provided guidance so as to diminish its prejudicial impact. *Newton v. State*, 313 Ga. App. 889, 723 S.E.2d 95 (2012).

Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior attempts to manufacture methamphetamine because the state needed the evidence of the defendant's prior drug conviction to show the defendant's bent of mind and course of conduct with respect to the methamphetamine offense at issue, criminal attempt to manufacture methamphetamine in violation of O.C.G.A. §§ 16-4-1 and 16-13-30(b); the defendant disclaimed any involvement with or knowledge of a methamphetamine laboratory. *Newton v. State*, 313 Ga. App. 889, 723 S.E.2d 95 (2012).

Evidence held sufficient.

Evidence was sufficient to support the defendant's conviction for attempted rape in violation of O.C.G.A. §§ 16-4-1 and 16-6-1(a)(1) because the victim's testimony as to the defendant forcing his penis into her vagina against her will sufficed to sustain the attempted rape conviction. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault and attempted rape because under the circumstances the jury was authorized to conclude that the defendant's ac-

tions, although circumstantial insofar as intent was concerned, provided sufficient evidence to establish that the defendant attempted to rape the victim; the defendant knocked the victim down and attempted to pull the victim into an isolated vacant lot and continued to do so despite the victim's struggles and attempted escape. *Wright v. State*, 314 Ga. App. 353, 723 S.E.2d 737 (2012).

Evidence that the defendant owned the house where the ingredients and equipment were found, the defendant talked to the codefendant about whether the codefendant should abscond and bought the codefendant a truck, and the defendant made a list of pharmacy directions for the codefendant so that the codefendant could avoid legal restrictions on the purchase of ingredients was sufficient to support a conviction for attempt to manufacture methamphetamine. *Taylor v. State*, No. A12A1877, 2013 Ga. App. LEXIS 244 (Mar. 21, 2013).

Conviction for attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

16-4-3. Charge of commission of crime as including criminal attempt.

JUDICIAL DECISIONS

Rule of lenity inapplicable. — With regard to defendant's conviction for criminal attempt to commit burglary in the first degree, the trial court did not err in not applying the rule of lenity because the crimes of criminal trespass and criminal attempt to commit a burglary do not ad-

dress the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime; thus, the rule of lenity did not apply. *Snow v. State*, No. A12A0885, 2012 Ga. App. LEXIS 867 (Oct. 22, 2012).

16-4-6. Penalties for criminal attempt.

JUDICIAL DECISIONS

Application of rule of lenity. — Because attempted murder and aggravated assault were felonies under O.C.G.A. §§ 16-4-6(a) and 16-5-21(j), and because first- and third-degree cruelty to children could not be proven by the same evidence under O.C.G.A. § 16-5-70(b) and (d)(2), the rule of lenity did not apply; therefore, the trial court properly denied the defendant's motion for a new trial. *Rollf v. State*, 314 Ga. App. 596, 724 S.E.2d 881 (2012).

Merger of counts for sentencing required. — Trial court erred by failing to merge the defendant's aggravated assault counts into the armed robbery count for purposes of sentencing because the offenses merged as a matter of fact, and as such, the aggravated assault conviction was the lesser offense and had to be merged into the attempted armed robbery conviction. *Reed v. State*, 318 Ga. App. 412, 734 S.E.2d 113 (2012).

16-4-7. Criminal solicitation.

JUDICIAL DECISIONS

Cited in *Cosmo v. State*, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

16-4-8. Conspiracy to commit a crime.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WHAT CONSTITUTES CONSPIRACY
JURY CHARGE

General Consideration

Theft by receiving stolen property. — Evidence was sufficient to sustain the codefendants' convictions for theft by receiving stolen property and conspiracy to commit theft by receiving stolen property since the testimony was sufficient to show that items of value, owned by someone other than the codefendants, were recovered from a warehouse over which the codefendants had control. A witness's misstatements concerning the specific address of the warehouse did not render the evidence insufficient as to the location from where the stolen property was recovered. *Robinson v. State*, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

Conspiracy as underlying felony. — State proved that the defendant possessed the intent required to commit the predi-

cate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

Cited in *Harper v. State*, 292 Ga. 557, 738 S.E.2d 584 (2013).

What Constitutes Conspiracy

Conspiracy to commit armed robbery. — Evidence was sufficient to sup-

port the defendant's conviction for conspiracy to commit armed robbery because evidence was presented that the defendant and a co-defendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the co-defendant gave a similar statement to the police. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because the defendant's claim that, pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that there were two weapons fired by different individuals. *Bailey v. State*, 291 Ga. 144, 728 S.E.2d 214 (2012).

Drug trafficking.

Evidence was sufficient to sustain the defendant's conviction for conspiracy to traffic methamphetamine over 400 grams in violation of O.C.G.A. §§ 16-4-8 and 16-13-31(e)(3) because an accomplice testified that the defendant supplied the accomplice with several pounds of methamphetamine, and that testimony was amply corroborated by other evidence in the re-

cord; the defendant's translator testified that the translator retrieved \$15,000 from the accomplice as payment for fronted methamphetamine, police officers recovered \$15,000 in cash from the translator upon leaving the accomplice's residence, and there were recorded conversations between the accomplice, the defendant, and the translator in which they discussed methamphetamine transactions. *Melesa v. State*, 314 Ga. App. 306, 724 S.E.2d 30 (2012).

Evidence was sufficient to establish that the defendant possessed marijuana with intent to distribute under a conspiracy theory because the defendant admitted to agreeing to drive a passenger to pick up the marijuana in exchange for the crack cocaine, which demonstrated an agreement between the defendant and the passenger; both the defendant and the passenger committed acts in furtherance of the agreement because the defendant drove the passenger to pick up the marijuana, and the passenger acquired the marijuana. *Stokes v. State*, 317 Ga. App. 435, 731 S.E.2d 118 (2012).

Jury Charge

Limiting instruction required. —

Reversal of a conviction for conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), was required because the trial court failed to provide any limiting instruction informing jurors that the purchaser and the buyer in a drug transaction could not conspire together. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

16-4-9. Withdrawal by coconspirator from agreement to commit crime.

JUDICIAL DECISIONS

Evidence insufficient to show defendant renounced and abandoned conspiracy. — Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the com-

mission of a crime because the defendant's claim that, pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the

murder scene and in positions indicating that there were two weapons fired by different individuals. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012).

CHAPTER 5

CRIMES AGAINST THE PERSON

Article 1

Homicide

Sec.
16-5-5. Assisted suicide; notification of licensing board regarding violation.

Article 3

Kidnapping, False Imprisonment, and Related Offenses

16-5-45. (For effective date, see note.) Interference with custody.
16-5-47. Posting model notice with human trafficking hotline information in businesses and on Internet; termination.

Article 7

Stalking

Sec.
16-5-95. Offense of violating family violence order; penalty.

Article 8

Protection of Elder Persons

16-5-100. Definitions.
16-5-101. Neglect to a disabled adult, elder person, or resident.
16-5-102. Exploitation and intimidation of disabled adults, elder persons, and residents; obstruction of investigation.
16-5-103. Exceptions to criminal liability.
16-5-104. Applicability.

Cross references. — Exemption from classification of vicious dog for attacks during criminal pursuit, § 4-8-21.

ARTICLE 1

HOMICIDE

16-5-1. Murder; felony murder.

Law reviews. — For article, “State v. Jackson and the Explosion of Liability for Felony Murder,” see 62 Mercer L. Rev. 1335 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INDICTMENT
INTENT AND MALICE
1. IN GENERAL
DEFENSES
EVIDENCE OF MALICE

FELONY MURDER

1. IN GENERAL
2. UNDERLYING FELONY

JURY INSTRUCTIONS

MERGER

SENTENCE

APPLICATION

1. IN GENERAL
2. CHILDREN AS VICTIMS
4. SPOUSES OR LOVERS AS VICTIMS

General Consideration

Requirements for accepting guilty plea.

Defendant's conviction for malice murder, which was based upon a guilty plea, was reversed because the record did not show that the defendant was advised of the right against self-incrimination as required by Boykin; the state did not fulfill the state's duty to ensure that the defendant's guilty plea was constitutionally valid, the state apparently did not ensure that the defendant was advised of and had effective representation regarding the right to appeal the conviction, and the state did not litigate the merits of the defendant's guilty plea in the habeas corpus hearings since the record could have been expanded. *Tyner v. State*, 289 Ga. 592, 714 S.E.2d 577 (2011).

Evidence sufficient for malice murder and felony murder. — Evidence that the defendant was in the victim's home after a neighbor heard glass breaking and called 9-1-1, that a ribbon from the defendant's home was used to strangle the victim, that both the victim's and the defendant's DNA were on the ribbon, and that the victim's wedding ring was found in the defendant's pocket supported defendant's convictions for malice murder and felony murder. *Muhammad v. State*, 290 Ga. 880, 725 S.E.2d 302 (2012).

Double jeopardy did not bar retrial. — Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., Amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not

apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutually exclusive. *Roesser v. State*, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Evidence sufficient to convict. — Evidence was sufficient to support the first defendant and the second defendant's convictions for murder, kidnapping, armed robbery, and burglary, as the evidence showed that the defendants were involved in a scheme to rob a person who they believed to be selling large amounts of marijuana from an apartment, that the defendants burst into the apartment brandishing guns, that one of the defendants fatally shot the victim, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. *Howard v. State*, 279 Ga. 166, 611 S.E.2d 3 (2005).

Defendant's murder conviction was supported by evidence showing that an eyewitness walked into a vacant house, saw the defendant and another man holding the crying victim at gunpoint and arguing with the victim over a drug debt, and then saw the defendant shoot the victim; it was the jury's role to determine whether the witness, a drug addict and a convicted felon, was credible. *Flowers v. State*, 291 Ga. 122, 728 S.E.2d 196 (2012).

Evidence was sufficient to support defendant's convictions for felony murder and armed robbery. One witness testified that the witness saw the defendant and the defendant's accomplice chasing the victim just prior to the shooting, while other witnesses testified that they saw the defendant and the defendant's accomplice fleeing the scene. *Milford v. State*, 291 Ga. 347, 729 S.E.2d 352 (2012).

Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. *Platt v. State*, 291 Ga. 631, 732 S.E.2d 75 (2012).

Jury could reasonably have inferred from the evidence that the defendant and the alleged shooter shared a criminal intent with respect to the shooting, as the two were in the car at the time of the shooting, stood at the front of the car together after the shooting, and eventually made their way to the same place. *Powell v. State*, 291 Ga. 743, 733 S.E.2d 294 (2012).

Indictment

Predicate felony not required for malice murder. — Indictment was not defective for failing to charge a predicate felony because the charge against the defendant was for malice murder, not felony murder. *Stephens v. State*, 291 Ga. 837, 733 S.E.2d 266 (2012).

Indictment alleging shooting sufficiently alleged instrumentality used was firearm. — Defendant, who pled guilty to malice murder, O.C.G.A. § 16-5-1, was not entitled to an out-of-time appeal based on the indictment's failure to allege the instrumentality used; the indictment's allegations that the defendant caused the death of the victim by shooting the victim was sufficient to give notice that the defendant was charged with killing the victim with the use of a firearm. *Brown v. State*, 290 Ga. 321, 720 S.E.2d 617 (2012).

Intent and Malice

1. In General

Prior similar transaction evidence properly admitted to show intent and bent of mind.

Trial court's determination that the state met the requirements for admission of similar transaction evidence was not an

abuse of discretion because evidence that the defendant used violence against an adult with whom the defendant had a close, loving relationship was admissible to show the defendant's bent of mind in using violence against a member of the defendant's family, even though the family member was a mere infant, and even though the family member suffered internal, rather than external, injuries. *Brinson v. State*, 289 Ga. 150, 709 S.E.2d 789 (2011).

Sufficient evidence of malice.

Evidence was sufficient to support the defendant's conviction for malice murder because the defendant hit the victim with a baseball bat during the course of an argument over a drug transaction, and an incident that occurred when the defendant was a juvenile was properly admitted to show course of conduct and bent of mind. *Jackson v. State*, 291 Ga. 54, 727 S.E.2d 454 (2012).

Evidence that the defendant, who lived with the victims, and another were seen arguing with the victims immediately before the fire, a witness saw the defendant walk over to an area on the side of the residence where gas cans were discovered, witnesses observed the defendant throw something followed by the eruption of flames in the front portion of the house, and a crime scene investigator and arson investigation expert both concluded an accelerant had been used to intentionally set a fire was sufficient to support convictions for malice murder. *Sharpe v. State*, 291 Ga. 148, 728 S.E.2d 217 (2012).

Evidence that the child victim appeared healthy before being left alone with the defendant for several hours before the morning on which the victim was found dead and that defendant attempted to flee to Mexico was sufficient to support defendant's conviction for malice murder. *Zamora v. State*, 291 Ga. 512, 731 S.E.2d 658 (2012).

Defenses

Defendant could not argue justification as a defense, etc.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the requested charge, which contrasted

justification, voluntary manslaughter, and murder, was an inaccurate statement of the law; the definition of “justifiable homicide” contained in the defendant’s request was inconsistent with and had been superceded by the current statutory scheme for the affirmative offense of justification; the existence of “reasonable fears” is irrelevant to the consideration of voluntary manslaughter. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Evidence of Malice

Evidence sufficient to support conviction.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a felony because the defendant and a codefendant began shooting across a street at someone, who returned fire, and the victim was an innocent 16-year-old bystander who was killed during the shootout. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder based on aggravated assault, possession of a firearm during the commission of a crime, and use of a firearm by a convicted felon because the defendant admitted to purposefully putting a gun to the fearful victim’s head and pulling the trigger. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder because numerous eyewitnesses saw the defendant fire a gun into a crowd striking the victim, shout expletives, and assert that the defendant was a killer; that the state did not produce certain evidence did not mean that the evidence presented was insufficient to allow a jury to find the defendant guilty of murder. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Possession of a stolen automobile was sufficient to support a felony murder conviction because the defendant’s possession of the stolen car played a role in the defendant’s decision to flee the police; the

defendant could have believed that the defendant could escape in the stolen car, where the defendant could not have escaped on foot, and the decision to remain in the stolen car in order to flee created a foreseeable risk of death. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder while in the commission of armed robbery, armed robbery, and conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), because: (1) the defendant and another buyer met with the victim and another seller where the defendant and the other buyer inspected marijuana which the victim and the other seller had for sale; (2) after some discussion about price, the victim told the defendant what the price was and that the defendant could take it or leave it; (3) the defendant said that the defendant would take it, pulled a gun from the defendant’s waistband, and fatally shot the victim; and (4) there was conflicting testimony as to whether the defendant took the marijuana and ran away with the marijuana after shooting the victim. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant’s convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence where a victim in an apartment next to the defendant’s was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Evidence that the defendant began the conflict, punching the victim shortly before the codefendant began to attack the victim, the defendant stood by and watched as the codefendant mercilessly continued the assault and encouraged the codefendant to “beat the victim’s ass,” and the defendant drove the codefendant away from the scene was sufficient for the jury to find the defendant guilty beyond a reasonable doubt of murder. *Simmons v. State*, 289 Ga. 773, 716 S.E.2d 165 (2011).

Defendant’s convictions of malice mur-

der, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. *Jackson v. State*, 289 Ga. 798, 716 S.E.2d 188 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, possession of a firearm during the commission of a crime, and participation in criminal street gang activity. The defendant and fellow gang members walked toward a group of teenagers in a front yard while yelling and making gang signals; the defendant fired once into the crowd, killing the victim, who was unarmed; and the defendant, who fled the scene, was the only person who fired a weapon and was identified to police as the shooter by witnesses who knew the defendant by name. *Jackson v. State*, 291 Ga. 25, 727 S.E.2d 120 (2012).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because the defendant's claim that, pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that

there were two weapons fired by different individuals. *Bailey v. State*, 291 Ga. 144, 728 S.E.2d 214 (2012).

Malice murder conviction was supported by evidence that, inter alia, multiple witnesses saw an individual matching the defendant's description in an argument prior to hearing multiple gunshots, the defendant admitted to a friend that the defendant shot the victim, phone records showed the defendant and the victim were communicating prior to the shooting and the defendant was in the vicinity of the hotel during that time, and the defendant was acting as a middle man for the victim's drug deal gone bad. *Brown v. State*, 291 Ga. 892, 734 S.E.2d 23 (2012).

State did more than rely on circumstantial evidence in convicting defendant. — There was sufficient evidence to support the defendant's murder conviction and the defendant's argument that the state relied solely on circumstantial evidence was belied by the admission of the defendant's statement to police that the defendant hit the victim with the ax handle. *Bunnell v. State*, 292 Ga. 253, 735 S.E.2d 281 (2013).

Felony Murder

1. In General

Circumstantial evidence was sufficient to sustain conviction in death of child.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of felony murder beyond a reasonable doubt because the victim did not have physical injuries when the victim's mother left the house on the day of the crime, and the defendant was the only person present during the hours in which the victim was physically injured; the pathologist testified that the location and severity of injuries was inconsistent with a mere fall from the bed. *Whitaker v. State*, 291 Ga. 139, 728 S.E.2d 209 (2012).

Evidence was sufficient to support conviction.

Evidence was sufficient to enable any rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and aggravated battery in connec-

tion with the death of a victim, the defendant's infant daughter, because the evidence showed that the defendant was the only person caring for the victim during the relevant time period and that the defendant caused the victim's death. *Brinson v. State*, 289 Ga. 150, 709 S.E.2d 789 (2011).

In a felony murder case, testimony of eyewitnesses, cell phone exchanges between the cell phone in defendant's possession and that of the victim just minutes before the shooting, the identification of a car used by the defendant as the car involved in the crime, and the defendant's statements about the shooting of the victim constituted sufficient evidence to enable a jury to find the defendant guilty beyond a reasonable doubt. *Slaughter v. State*, 289 Ga. 790, 716 S.E.2d 180 (2011).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary, after the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. *Brown v. State*, 291 Ga. 750, 733 S.E.2d 300 (2012).

Instruction on proximate cause in relationship to felony murder. — Trial court did not err in failing to instruct the jury on the law regarding proximate cause and its relationship to felony murder because the omission of additional language concerning proximate cause could not be considered a clear or obvious error under O.C.G.A. § 17-8-58; the jury was instructed that to find the defendant guilty of felony murder while in the commission of felony criminal attempt to possess cocaine, the jury had to find beyond a reasonable doubt that the felony was dangerous per se or, by the attendant circumstances in the case, created a foreseeable risk of death, and the jury was also instructed that for felony murder to be found, the jury had to find that, in the commission of the underlying felony, the

defendant caused the death of another human being irrespective of malice. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

2. Underlying Felony

Aggravated assault as underlying felony.

Defendant's conviction for aggravated assault was not authorized because the count of the indictment that alleged aggravated assault had to be merged into the felony murder count; although the felony murder and the underlying felony were committed on different victims, the count of the indictment alleging felony murder set forth the aggravated assault against a victim as the underlying felony supporting the charge of felony murder. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

Jury was authorized to find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder during the commission of aggravated assault in the manner alleged in the indictment because at trial the medical examiner testified that the cause of the victim's death was suffocation; although the defendant told an ex-spouse over the phone that the defendant choked the victim, there was no other evidence to corroborate that statement while there was much physical and scientific evidence that pointed to the cause of death as suffocation. *Davis v. State*, 290 Ga. 421, 721 S.E.2d 886 (2012).

Robbery of gas station attendant. — Evidence that the defendant shot the victim, a service station attendant, while attempting to rob the service station with a revolver was sufficient to support the defendant's conviction for felony murder. *Brockman v. State*, 739 S.E.2d 332, No. S12P1490, 2013 Ga. LEXIS 201 (2013).

Participation in drug transaction meant no instruction on justification. — Based on the evidence supporting the defendant's participation in a felony drug transaction at the time of the fatal shooting of the victim, the trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that a person was not justified in using force in defense of self or others if the person was attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; the defendant affirmatively chose to engage in the potentially dangerous and violent criminal business of a felony drug deal before the fatal confrontation with the victim took place. *Smith v. State*, 290 Ga. 768, 723 S.E.2d 915 (2012).

Possession of controlled substance. — Because the defendant participated in a felony drug deal as the purchaser, the defendant was affirmatively choosing to engage in a dangerous and potentially violent criminal activity; thus, the defendant's criminal attempt to possess cocaine was dangerous and sufficiently connected to the murder so as to also serve as an underlying felony for the felony murder conviction. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Jury Instructions

Charge on transferred intent inappropriate. — Because the charge on transferred intent was not adjusted to the evidence, it was error for the trial court to so instruct the jury, and trial counsel performed deficiently by failing to object to the giving of that charge and the prosecutor's closing argument addressing the inapplicable principles of transferred intent; there was no evidence that the defendant was intending to shoot any other person when the defendant shot the victim so as to bring the case within the typical "innocent bystander" scenario in which the doctrine of transferred intent

was applied, but in light of the overwhelming evidence of the defendant's guilt, it was highly probable that the charge did not contribute to the verdict. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

No error in recharging jury.

Trial court did not err by defining "malice aforethought" in response to a request from the jury for a recharge because the instruction was based on the pattern charge and was legally correct; given the correct and detailed instructions contained in the trial court's original charge to the jury, it was unlikely that the jury was confused by the recharge, which clearly indicated that premeditation was not an element of the crime. *Dukes v. State*, 290 Ga. 486, 722 S.E.2d 701 (2012).

Charge of mutual combat.

Trial counsel did not perform deficiently by failing to request a charge on mutual combat because there was no evidence of a mutual intention to fight; at trial, the defendant presented the defense of accident and asserted that the defendant lacked any intention to shoot the victim, but there was no evidence reflected that the defendant and the victim mutually agreed to fight each other. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Instruction on voluntary manslaughter not warranted.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). *Davidson v. State*, 289 Ga. 194, 709 S.E.2d 814 (2011).

During the defendant's murder trial, the trial court did not err by denying the

defendant's request to charge on the lesser included offense of voluntary manslaughter, O.C.G.A. § 16-5-2, since the defendant testified that the defendant fired a pistol because the defendant was "just scared," and acting out of fear was not the same as acting in the heat of a sudden irresistible passion. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Trial court did not give the jury an incomplete charge regarding the lesser included offense of voluntary manslaughter because the instruction did not prevent the jury from fully considering voluntary manslaughter and was adequate to inform the jury that before the jury could convict defendant of malice or felony murder, the jury had to first consider whether there was sufficient evidence of passion or provocation to support a conviction for voluntary manslaughter. *Kendrick v. State*, 290 Ga. 873, 725 S.E.2d 296 (2012).

Instruction on involuntary manslaughter not warranted.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Trial court did not err by denying the defendant's request to charge the jury on involuntary manslaughter as a lesser included offense of the felony murder charge because the defendant's admitted act of purposefully firing a gun at the victim constituted the felony offense of aggravated assault, not reckless conduct; the jury's verdict of guilty on the felony mur-

der charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Kendrick v. State*, 290 Ga. 873, 725 S.E.2d 296 (2012).

Instruction on nexus between felony and death. — Trial court did not err in charging the jury on the nexus requirement between the felony and the death of the victim because the trial court gave the jurors the pattern charge on felony murder at least three times. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Charge of accident not warranted.

— In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming *arguendo* that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Self-defense instruction properly refused.

Trial court was authorized to instruct the jury pursuant to O.C.G.A. § 16-3-21(b)(2) that self-defense was inapplicable when the defendant was attempting to commit or was committing a felony because the defendant made an affirmative choice to engage in a dangerous and potentially violent criminal activity when the defendant participated in a drug transaction. *Davis v. State*, 290 Ga. 757, 725 S.E.2d 280 (2012).

Instruction on vehicular homicide.

— Trial court did not err in denying the defendant's request to instruct the jury on vehicular homicide as a lesser-included offense of felony murder because that lesser-included offense was not before the jury; before the case went to the jury, the trial court entered a directed verdict in the defendant's favor on the greater offense of felony murder and, thus, as the jury did not consider the greater offense, it could likewise not consider the lesser included offense for which the defendant had not been indicted. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

No error in failing to charge on mere presence.

In a murder prosecution, the trial court did not err when the court refused to give the defendant's requested charge on mere presence as there was no evidence that the defendant was merely present when the victim was shot; instead, the uncontroverted evidence showed that the defendant took an active part in the victim's death. *Flowers v. State*, 291 Ga. 122, 728 S.E.2d 196 (2012).

Instruction on inherent dangerousness not required. — Trial court did not err in refusing to instruct the jury regarding inherent dangerousness because an instruction on inherent dangerousness was not required. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Merger

Merger of manslaughter conviction.

Trial court properly refused to accept the jury's initial verdict finding the defendant guilty of both felony murder and voluntary manslaughter because the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge; therefore, the jury could not find the defendant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were ambiguous. *Ingram v. State*, 290 Ga. 500, 722 S.E.2d 714 (2012).

Merger of malice murder and aggravated assault.

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a

fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Defendant's conviction on a second aggravated assault should have merged into the malice murder conviction because the victim sustained two shots to the arm and one fatal shot to the back of the head, and the evidence did not authorize the finding of an additional "deliberate interval" between the second shot to the arm and the shot to the head; both were inflicted in close succession as the defendant confronted the victim. *Ortiz v. State*, 291 Ga. 3, 727 S.E.2d 103 (2012).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder, as both convictions were established by the same conduct. *Hernandez v. State*, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Merger with armed robbery count.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Underlying conspiracy conviction merged into felony murder conviction. — Defendant's separate conviction for conspiracy was vacated because the conspiracy conviction was the underlying felony that formed the basis for the defendant's felony murder conviction; because the underlying conspiracy merged into the felony murder conviction, the trial court erred in entering a separate judgment of conviction and sentence on the jury's verdict finding the defendant guilty of conspiracy. *Higuera-Hernandez v. State*, 289 Ga. 553, 714 S.E.2d 236 (2011).

Conviction for apprehending criminal and malice murder. — Defendant's

conviction for hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 had to be set aside because defendant could not be convicted for both malice murder and hindering the apprehension of a criminal, which was the equivalent of the common law crime of being an accessory after the fact; a party cannot be convicted both of being a principal to the crime and an accessory after the fact. *Hampton v. State*, 289 Ga. 621, 713 S.E.2d 851 (2011).

Sentence

Sentence of life in prison without parole did not violate due process. — O.C.G.A. § 16-5-1(d) was not unconstitutional as applied to the defendant due to an alleged lack of a mechanism or guidance for the imposition of a sentence or the provision of mitigating evidence because, while no individual determination was required to sentence the defendant in a non-death penalty case, the defendant was allowed to submit mitigating evidence at sentencing, so the defendant's due process rights were not violated. *Williams v. State*, 291 Ga. 19, 727 S.E.2d 95 (2012).

Two life sentences for murder of single victim.

Defendant's three additional life sentences for felony murder were illegal and could not stand because the trial court erred in failing to sentence the defendant only on the two malice murder counts; the convictions for felony murder were simply surplusage, which should properly have been disposed of by the trial court's sentence of only one life sentence for each of the malice murder counts. *Brown v. State*, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, U.S. , 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

Sentence for felony murder and felony criminal attempt to possess cocaine. — Separate judgment of conviction and sentence for criminal attempt to possess cocaine was vacated because after the jury found the defendant guilty of felony murder while in the commission of the felony of criminal attempt to possess cocaine, and also of the felony of criminal attempt to possess cocaine, the defendant was sentenced on each charge, but the

defendant could not be sentenced on both felony murder and the underlying felony when found guilty of both. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

Application

1. In General

Circumstantial evidence.

Evidence, although circumstantial, was sufficient for a rational trier of fact to reject the defense theory that the victim's death was a suicide and to find the defendant guilty of malice murder beyond a reasonable doubt; the circumstantial evidence was substantial, including not only the nature of the victim's gunshot wound, but also the defendant's motive to harm the victim, and the defendant's prolonged cover-up and conflicting accounts of the victim's death. *Walden v. State*, 289 Ga. 845, 717 S.E.2d 159 (2011).

Evidence sufficient for murder conviction.

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder and possession of a firearm during the commission of a crime because although there were defense witnesses who testified that someone else, and not defendant, was the actual shooter, and there were inconsistencies and contradictions in the testimony of the state's witnesses, the jury, after considering all of the evidence, chose to believe the state's version and that defendant's witnesses were not credible. *Martinez v. State*, 289 Ga. 160, 709 S.E.2d 797 (2011).

Evidence was sufficient to support the defendant's conviction for malice murder because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to authorize a

rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a crime because the three men who were with the victim when the victim was shot identified the defendant as the person who fired shots at them; there was testimony that the defendant was the boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim and that the defendant and the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Evidence presented at trial was sufficient to authorize a rational jury to reject the defendant's justification defense and find the defendant guilty of murder beyond a reasonable doubt because the defendant was involved in a pool hall fight, drew a pistol, and opened fire, killing the victim. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Evidence was sufficient to support convictions for malice murder because: (1) before the decedent's death, the decedent told a friend that the decedent had been beaten in a fight by one of the defendants; (2) the other defendant placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (3) the truck was destroyed in an arson fire near an apartment complex where the defendants were staying with relatives; (4) the decedent's body was found in the bed of the truck; (5) the decedent had been dead for days before the fire; and (6) personal belongings of the decedent were found in the possession of the defendants. *Miller v. State*, 289 Ga. 854, 717 S.E.2d 179 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder beyond a reasonable doubt because police found the victim beaten, stabbed, and strangled in the living room, and blood evidence collected at the scene later connected the defendant to the crime. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

Evidence was sufficient to authorize a

rational trier of fact to find the defendant guilty of malice murder and possession of a firearm during the commission of a felony because the state's case rested on direct as well as circumstantial evidence; the direct evidence included testimony by an eyewitness that the defendant was the shooter, testimony by another witness who overheard the defendant discussing the shooting and laughing at the fact that the defendant killed the victim in front of the victim's children, and the confession of the defendant to police officers that the defendant shot the victim. *Rockholt v. State*, 291 Ga. 85, 727 S.E.2d 492 (2012).

Evidence supported the defendant's convictions of felony murder during the commission of aggravated assault, aggravated assault, possession of marijuana, and possession of a firearm during the commission of a crime since: (1) after smoking marijuana, the defendant attacked the victim, pulled a gun from the defendant's pocket, and shot the victim four times; (2) the victim told the police that the defendant did it; (3) the victim died; (4) a knife was found near the victim, the defendant had a stab wound, and the defendant claimed self-defense; and (5) witnesses one and two saw the defendant pull the gun but did not see the victim with a knife. *Hill v. State*, 291 Ga. 160, 728 S.E.2d 225 (2012).

State's physical evidence, including the victim's blood on the defendant's shirt, the defendant's unexplained possession of the victim's truck, watch, and other personal property, and the fact that the defendant was seen near the victim's residence and farm not long before the crimes were committed, supported the defendant's convictions for malice murder and armed robbery. *Blevins v. State*, 291 Ga. 814, 733 S.E.2d 744 (2012).

When the medical examiner determined that, although the autopsy revealed other medical conditions, the cause of the victim's death was delayed complications from the blunt force trauma to the victim's head, the evidence was sufficient to establish that the defendant's actions were the cause of the victim's subsequent death. *Clarke v. State*, 292 Ga. 305, 737 S.E.2d 575 (2013).

Evidence that the victim's brother told

an officer the brother thought the victim was dead because the defendant, the father, had killed the victim; that the defendant admitted to family members, while meeting in an interview room at the police station, that the defendant killed the victim; and that the victim had been strangled to death was sufficient to support the defendant's conviction for malice murder. *Rashid v. State*, 292 Ga. 414, 737 S.E.2d 692 (2013).

Defendant's claim that the evidence was insufficient to support the convictions for malice murder and possession of a firearm during the commission of a felony because the state was unable to present evidence to disprove the earlier incident between the defendant and the victim or disprove that the defendant acted in self-defense when the defendant shot the victim failed because testimony from eyewitnesses to the shooting and forensic evidence belied the claim that the defendant acted in self-defense. Among other things, the defendant testified the defendant shot the victim because the victim pulled out a knife, claiming the defendant saw the blade; however, two closed pocket knives were found. *Hoffler v. State*, 292 Ga. 537, 739 S.E.2d 362 (2013).

Testimony from two witnesses that the witnesses recognized the defendant from the defendant's distinctive walk and that one also recognized the defendant from the defendant's posture, shoulders, complexion, and nose; the fact that a dark fiber like one that could have been from the shooter's wig was found in the defendant's truck; and the defendant's admission to an inmate that the defendant shot the victim supported the defendant's convictions for malice murder and possession of a firearm during the commission of a felony. *Hayes v. State*, 292 Ga. 506, 739 S.E.2d 313 (2013).

Doctor's prescription of controlled substances causing death. — Felony murder conviction was supported by evidence that the defendant illegally provided controlled substances through prescriptions, a dangerous felony, and that the victim's death was a foreseeable result within the meaning of the felony murder statute. *Chua v. State*, 289 Ga. 220, 710 S.E.2d 540 (2011).

Felony murder predicated on drug transaction. — Defendant was properly convicted of felony murder predicated on a drug transaction and attempted violation of the Georgia Controlled Substance Act (VGCSA), O.C.G.A. § 16-13-20 et seq., because there was a sufficient nexus between the VGCSA and the victim's death to show that the defendant's participation in the drug transaction was the proximate cause of the victim's death because four men met for a drug transaction and something went wrong; during the course of the events, the defendant shot and killed the victim; thus, the felony the defendant committed directly and materially contributed to the happening of a subsequent accruing immediate cause of the death. *Davis v. State*, 290 Ga. 757, 725 S.E.2d 280 (2012).

2. Children as Victims

Evidence sufficient for murder of infant child.

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Cruelty to child as underlying felony in felony murder.

Evidence was sufficient to enable a jury to find the defendant guilty of murder, felony murder, cruelty to children, and aggravated battery for the death of the defendant's baby because the defendant admitted to a number of actions consistent with the fatal injuries suffered by the baby; the actions the defendant took against the baby and the resulting injuries were reflected in the autopsy findings. *Stokes v. State*, 289 Ga. 702, 715 S.E.2d 81 (2011).

Death of infant from shaking. — The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's con-

victions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

4. Spouses or Lovers as Victims
Evidence sufficient for malice murder of spouse.

Evidence that the victim, the defendant's wife, was killed in the victim's bed, the defendant reported the shooting but was not at the house when police arrived, the gun was found under the pillow next to the victim, a crime scene technician testified that the shooter folded a pillow around the victim's head and shot the victim through the pillow, and testimony that the defendant was physically and emotionally abusive toward the victim was sufficient to support the defendant's conviction for malice murder. *Smith v. State*, No. S12A1978, 2013 Ga. LEXIS 258 (Mar. 18, 2013).

RESEARCH REFERENCES

ALR. — Sufficiency of evidence to support homicide conviction where no body was produced, 65 ALR6th 359.

16-5-2. Voluntary manslaughter.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- DEFENSES
- JURY CHARGE
- APPLICATION

General Consideration

Merger of conviction into felony murder.
 Trial court properly refused to accept the jury's initial verdict finding the defendant guilty of both felony murder and voluntary manslaughter because the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge; therefore, the jury could not find the defendant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were ambiguous.

Ingram v. State, 290 Ga. 500, 722 S.E.2d 714 (2012).
Double jeopardy did not bar retrial. — Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., Amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutu-

ally exclusive. *Roesser v. State*, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Cited in *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defenses

Self-defense.

Evidence was sufficient to support the defendant's conviction for voluntary manslaughter because the defendant's testimony that the initial shot to the victim's head was an accident and that the defendant kept shooting because the victim threatened to kill the defendant was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant did not justifiably use deadly force to protect oneself, after the victim already had been shot in the head, from the victim's assault pursuant to O.C.G.A. § 16-3-21(a); or the jury simply could have disbelieved the defendant's claim of self-defense, given the number of gunshots fired. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims had engaged in a heated argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather simply in self defense, when the defendant shot an unarmed victim. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Jury Charge

Instruction requiring jury to consider malice murder, felony murder, and voluntary manslaughter simultaneously. — Defendant failed to establish plain error in the trial court's charge pur-

suant to O.C.G.A. § 17-8-58 because the trial court clearly instructed the jury that before it was authorized to return a verdict of guilty of malice murder or felony murder, it had to first determine whether mitigating circumstances would cause the offense to be reduced to voluntary manslaughter; the structure of the actual verdict form made it clear that, as to each victim, the jury was required to consider malice murder, felony murder, and voluntary manslaughter simultaneously. *Ortiz v. State*, 291 Ga. 3, 727 S.E.2d 103 (2012).

Evidence held sufficient to authorize a charge on voluntary manslaughter.

Trial court erred in failing to instruct the jury on the lesser-included offense of voluntary manslaughter under O.C.G.A. § 16-5-2(a) and in ruling that defendant could not introduce evidence relevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. § 24-401 et seq.) based on the cumulative effect of the victim's alleged molestation of defendant's niece, defendant's discovery thereof, and the victim's taunt. *Scott v. State*, 291 Ga. 156, 728 S.E.2d 238 (2012).

Failure to instruct on voluntary manslaughter not error.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). *Davidson v. State*, 289 Ga. 194, 709 S.E.2d 814 (2011).

Trial court's failure to instruct a jury on the lesser included offense of voluntary manslaughter was not error since there was no evidence that the defendant acted in response to a sudden, violent passion

resulting from serious provocation. The victim's death was either the cold, calculated method by which defendant intended to profit or, at best, the unfortunate result of resisting an armed robbery. *McNeal v. State*, 289 Ga. 711, 715 S.E.2d 95 (2011).

During the defendant's murder trial, the trial court did not err by denying the defendant's request to charge on the lesser included offense of voluntary manslaughter, O.C.G.A. § 16-5-2, since the defendant testified that the defendant fired a pistol because the defendant was "just scared," and acting out of fear was not the same as acting in the heat of a sudden irresistible passion. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Defendant was not entitled to an instruction on voluntary manslaughter because, while the testimony provided some evidence that the defendant might have acted in self-defense, there was no evidence that the defendant acted passionately. *Allen v. State*, 290 Ga. 743, 723 S.E.2d 684 (2012).

Trial court did not give the jury an incomplete charge regarding the lesser included offense of voluntary manslaughter because the instruction did not prevent the jury from fully considering voluntary manslaughter and was adequate to inform the jury that, before the jury could convict defendant of malice or felony murder, the jury had to first consider whether there was sufficient evidence of passion or provocation to support a conviction for voluntary manslaughter. *Kendrick v. State*, 290 Ga. 873, 725 S.E.2d 296 (2012).

Habeas court erred in granting a petitioner relief on the ground that the trial court erred when the court refused to instruct the jury on the offense of voluntary manslaughter under O.C.G.A. § 16-5-2(a) when appellate counsel failed to present the question on direct appeal, and neither the petitioner's nor the state's evidence tended to show a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. *Humphrey v. Lewis*, 291 Ga. 202, 728 S.E.2d 603 (2012).

In a case in which the defendant was convicted of felony murder and armed

robbery, the trial court did not err by failing to charge the jury on the lesser included offense of voluntary manslaughter when the defendant took the victim's bicycle at gunpoint, and when the defendant saw the victim on the telephone, the defendant began chasing the victim and shot the victim in the throat; this evidence did not show the sudden, violent, and irresistible passion required to warrant an instruction on voluntary manslaughter. *Milford v. State*, 291 Ga. 347, 729 S.E.2d 352 (2012).

Evidence did not support a jury instruction on voluntary manslaughter as the evidence showed, at most, that the defendant and the victim, the defendant's wife, argued about the defendant's infidelity and that the defendant choked the victim the next morning. It appeared that a few hours had passed between the argument and the killing. *Merritt v. State*, 292 Ga. 327, 737 S.E.2d 673 (2013).

Trial court did not err in refusing to instruct the jury on voluntary manslaughter as a lesser included offense of malice murder because there was no serious provocation that would have elicited a violent and irresistible passion in a reasonable person. *Campbell v. State*, No. S12A1804, 2013 Ga. LEXIS 257 (Mar. 18, 2013).

In an action charging the defendant with felony murder, the defendant was not entitled to a jury instruction on voluntary manslaughter and there was no evidence of provocative conduct by the victim sufficient to warrant such an instruction. *Brockman v. State*, 739 S.E.2d 332, No. S12P1490, 2013 Ga. LEXIS 201 (2013).

Instruction on involuntary manslaughter unwarranted.

Trial court erred by refusing to charge the jury on involuntary manslaughter, O.C.G.A. § 16-5-3, because a charge on involuntary manslaughter was not generally allowed when the defendant alleged self-defense as the defendant did regarding the shots the defendant fired at the victim after the first shot, and under the facts, the defense of accident as to the first shot did not require such a charge; a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was not required, given that

the evidence relied upon by the defendant established either that the pistol discharged accidentally when the victim wrestled for the pistol's control or that the defendant intentionally fired the weapon. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Voluntary manslaughter charge not erroneous. — Trial court did not err in charging the jury that words alone were insufficient provocation to support a verdict of voluntary manslaughter and that the jury had to find that words were accompanied by menaces in order to sustain a manslaughter verdict because there was no evidence that the victim recounted, taunted, or bragged about sexual involvement with other men; therefore, the circumstances regarding the victim's alleged adulterous conduct did not suffice to replace the requirement of menaces. *Davis v. State*, 290 Ga. 421, 721 S.E.2d 886 (2012).

Application

Reducing murder to voluntary manslaughter based on victim's alco-

hol use. — With regard to the defendant's murder conviction for killing his wife, the trial court properly excluded evidence of the victim's alcohol use to show the provocation necessary to reduce murder to voluntary manslaughter because the defendant failed to present any evidence of the effect the victim's alcohol consumption had on her behavior on the day she was stabbed. *Dunn v. State*, 292 Ga. 359, 736 S.E.2d 392 (2013).

Evidence sufficient for voluntary manslaughter conviction.

Evidence was sufficient to show beyond a reasonable doubt that the defendant was guilty of voluntary manslaughter in that the defendant shot and killed the victim out of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person under O.C.G.A. § 16-5-2(a). *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

RESEARCH REFERENCES

ALR. — Sufficiency of evidence to support homicide conviction where no body was produced, 65 ALR6th 359.

16-5-3. Involuntary manslaughter.

JUDICIAL DECISIONS

ANALYSIS

JURY INSTRUCTIONS

Jury Instructions

Instruction on involuntary manslaughter unwarranted.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's

testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Trial court erred by refusing to charge the jury on involuntary manslaughter, O.C.G.A. § 16-5-3, because a charge on

involuntary manslaughter was not generally allowed when the defendant alleged self-defense as the defendant did regarding the shots the defendant fired at the victim after the first shot, and under the facts, the defense of accident as to the first shot did not require such a charge; a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was not required, given that the evidence relied upon by the defendant established either that the pistol discharged accidentally when the victim wrestled for the pistol's control or that the defendant intentionally fired the weapon. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Trial court did not err by denying the defendant's request to charge the jury on involuntary manslaughter as a lesser included offense of the felony murder charge because the defendant's admitted act of purposefully firing a gun at the victim constituted the felony offense of aggravated assault, not reckless conduct; the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Kendrick v. State*, 290 Ga. 873, 725 S.E.2d 296 (2012).

Failure to charge jury was not prejudicial.

While the trial court erred in rejecting the defendant's written request to charge the jury on unlawful act involuntary manslaughter, pursuant to O.C.G.A. § 16-5-3(a), as a lesser included offense of the crime of murder, the error was harmless because there was overwhelming evidence inconsistent with the defendant's version of events, but supportive of the jury's finding the defendant guilty of malice murder. *Rogers v. State*, 289 Ga. 675, 715 S.E.2d 68 (2011).

Failure to charge on manslaughter not erroneous.

Trial court did not err in refusing to give the defendant's two requested jury charges on involuntary manslaughter because the defendant's own testimony that the gun the defendant was holding made contact with the victim, and when the gun did the defendant gave a push and told the victim to get back, revealed that the defendant's purpose in pointing the weapon was to place the victim in apprehension of immediate violent injury so that there was no basis for a charge on involuntary manslaughter. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

RESEARCH REFERENCES

ALR. — Sufficiency of evidence to support homicide conviction where no body was produced, 65 ALR6th 359.

16-5-5. Assisted suicide; notification of licensing board regarding violation.

(a) As used in this Code section, the term:

(1) "Assists" means the act of physically helping or physically providing the means.

(2) "Health care provider" means any person licensed, certified, or registered under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43.

(3) "Suicide" means the intentional and willful termination of one's own life.

(b) Any person with actual knowledge that a person intends to commit suicide who knowingly and willfully assists such person in the

commission of such person's suicide shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

(c) The provisions of this Code section shall not apply to:

(1) Pursuant to a patient's consent, any person prescribing, dispensing, or administering medications or medical procedures when such actions are calculated or intended to relieve or prevent such patient's pain or discomfort but are not calculated or intended to cause such patient's death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death;

(2) Pursuant to a patient's consent, any person discontinuing, withholding, or withdrawing medications, medical procedures, nourishment, or hydration;

(3) Any person prescribing, dispensing, or administering medications or medical procedures pursuant to, without limitation, a living will, a durable power of attorney for health care, an advance directive for health care, or a consent pursuant to Code Section 29-4-18 or 31-9-2 when such actions are calculated or intended to relieve or prevent a patient's pain or discomfort but are not calculated or intended to cause such patient's death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death;

(4) Any person discontinuing, withholding, or withdrawing medications, medical procedures, nourishment, or hydration pursuant to, without limitation, a living will, a durable power of attorney for health care, an advance directive for health care, a consent pursuant to Code Section 29-4-18 or 31-9-2, or a written order not to resuscitate; or

(5) Any person advocating on behalf of a patient in accordance with this subsection.

(d) Within ten days of a conviction, a health care provider who is convicted of violating this Code section shall notify in writing the applicable licensing board for his or her licensure, certification, registration, or other authorization to conduct such health care provider's occupation. Upon being notified and notwithstanding any law, rule, or regulation to the contrary, the appropriate licensing board shall revoke the license, certification, registration, or other authorization to conduct such health care provider's occupation. (Code 1981, § 16-5-5, enacted by Ga. L. 2012, p. 637, § 1/HB 1114.)

Effective date. — This Code section became effective May 1, 2012.

Cross references. — Notification of

licensing boards of judgments against health care provider, § 51-4-6.

Editor's notes. — Former Code Sec-

tion 16-5-5, concerning offering to assist in commission of suicide and criminal penalties therefor, was based on Ga. L. 1994, p. 1370, § 1; Ga. L. 2007, p. 133, § 5/HB 24 and was repealed by Ga. L. 2012, p. 637, § 1/HB 1114, effective May 1, 2012.

Ga. L. 2012, p. 637, § 4/HB 1114, not codified by the General Assembly, provides that: “This Act shall not apply to any

offense committed before the effective date of this Act.” This Act became effective May 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 278 (2012). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 16-5-5 are included in the annotations for this Code section.

O.C.G.A. § 16-5-5(b) unconstitutional. — Former O.C.G.A. § 16-5-5(b) was unconstitutional under the free speech provisions of the United States and Georgia Constitutions, U. S. Const., Amend. 1 and Ga. Const. 1983, Art. I, Sec. I, Para. V, because it was not all assisted suicides that were criminalized but only those that include a public advertisement

or offer to assist; because the state failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity was sufficiently problematic to justify an intrusion on protected speech rights, it could not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense. *Final Exit Network, Inc. v. State*, 290 Ga. 508, 722 S.E.2d 722 (2012) (decided under former O.C.G.A. § 16-5-5).

ARTICLE 2
ASSAULT AND BATTERY

16-5-20. Simple assault.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION
JURY INSTRUCTION

General Consideration

Mutually exclusive verdicts.

Since the defendant’s conviction for aggravated assault was based on placing the victim in reasonable apprehension of immediately receiving a violent injury, pursuant to O.C.G.A. § 16-5-20(a)(2), the guilty verdict did not preclude the element of criminal negligence in reckless conduct and, therefore, was not mutually exclusive with a verdict of guilt as to serious injury by vehicle predicated on reckless driving. *Dryden v. State*, 316 Ga. App. 70, 728 S.E.2d 245 (2012).

Cited in *Myers v. State*, 311 Ga. App. 668, 716 S.E.2d 772 (2011); *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011); *Hall v. State*, 313 Ga. App. 66, 720 S.E.2d 181 (2011); *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012); *Williams v. State*, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Application

Reasonable apprehension of violent injury.

Evidence was sufficient to uphold the defendant’s conviction for aggravated as-

sault because all of the victims were together in a group, and one of the victim's testified that guns were pointed at everybody; the defendant's act of firing the weapon into the group made each individual a separate victim, and testimony that the victims were crying and screaming when the defendant fired was sufficient for the jury to conclude that the group too had a reasonable apprehension of receiving a violent injury, O.C.G.A. § 16-5-20(a)(2). *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Excessive force. — When a decedent was tased once in the prong mode during an arrest, and all subsequent tasings were in the dry stun mode, a deputy and an officer were entitled to qualified immunity as to an excessive force claim because the illegality of their behavior was not clearly established at the time since their conduct did not rise to the level of “obvious clarity,” because, *inter alia*, the decedent committed assault and battery on a police officer, the decedent’s acts were contemporaneous with repeated threats to kill the deputy, and the decedent resisted during the entire time that they tried to handcuff the decedent. *Hoyt v. Cooks*, 672 F.3d 972 (11th Cir. 2012), cert. denied, U.S. , 133 S. Ct. 138, 184 L. Ed. 2d 29 (2012).

Jury Instruction

Charge on simple assault not required.

Because defendant intentionally shot the victim, wounded the victim, chased the victim down, and intentionally shot the victim three more times as the victim begged for the victim’s life, and as neither negligence nor reckless conduct was an issue, the trial court did not err by failing

to instruct the jury on simple assault under O.C.G.A. § 16-5-20(a) in connection with the court’s charge on aggravated assault under O.C.G.A. § 16-5-21. *Cantera v. State*, 289 Ga. 583, 713 S.E.2d 826 (2011).

Trial court did not plainly err in the court’s jury instruction on aggravated assault when the trial court’s instructions included the definition of aggravated assault with a deadly weapon in O.C.G.A. § 16-5-21(a)(2) and tracked the applicable definition of simple assault in O.C.G.A. § 16-5-20(a)(1). *Scott v. State*, 290 Ga. 883, 725 S.E.2d 305 (2012).

Charge on simple assault as element of aggravated assault.

Trial court’s jury charge on aggravated assault was not erroneous because the trial court properly tailored the court’s charge to the allegation in the indictment by charging the jury with just the relevant portion of the simple assault statute, O.C.G.A. § 16-5-20(a)(1); the trial court did as the court was required and delivered a charge tailored to the indictment. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Failure to charge on simple assault waived. — Appellate review of the trial court’s decision not to give a charge on the lesser included offense of simple assault was waived because trial counsel admitted that counsel acquiesced and did not further object to the trial court’s decision to not give the charge. *Gunter v. State*, 316 Ga. App. 485, 729 S.E.2d 597 (2012).

Proper jury charge.

Trial court did not refuse to charge on simple assault because the trial court gave verbatim the charge that the defendant complained was not given. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

16-5-21. Aggravated assault.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- INDICTMENT
- INCLUDED CRIMES
- ASSAULT WITH DEADLY WEAPON

ASSAULT WITH GUN
 ASSAULT WITH AUTOMOBILE
 ASSAULT WITH HANDS, FISTS, OR OTHER BODY PARTS
 ASSAULT WITH OTHER OBJECTS
 ASSAULT WITH INTENT TO ROB
 ASSAULT WITH INTENT TO RAPE
 JURY INSTRUCTIONS

General Consideration

Venue.

Victim's testimony was sufficient evidence to prove venue in Henry County because the victim testified that the aggravated assault offense occurred at the house of the defendant's father, which was located in Henry County; the responding officer likewise testified that the house was located in Henry County. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Extrinsic evidence held harmless.

— Defendant's conviction for armed robbery and aggravated assault was affirmed because, given the overwhelming evidence, it was highly unlikely that the admission of the testimony concerning the subsequent burglary contributed to the verdict in this case, even if it was erroneous to allow such evidence. *Hutchinson v. State*, 318 Ga. App. 627, 733 S.E.2d 517 (2012).

Jury determinations.

Testimony of the victim and other state witnesses was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of aggravated assault, criminal damage to property in the second degree, and battery because it was the role of the jury, not the court of appeals, to resolve conflicts in the evidence, assess witness credibility, and decide whether to believe the victim's or the defendant's version of events; the defendant punched the victim, drew a handgun from the defendant's pants, and fired at the victim, and at trial, the victim, the responding officers, and the state's ballistic expert testified to the events. *Bryant v. State*, 309 Ga. App. 649, 710 S.E.2d 854 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary,

O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because, although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Guilty plea free and voluntary.

Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea to aggravated assault because the defendant was thoroughly questioned about the plea, fully informed and cognizant of the rights the defendant was waiving, and fully aware of the consequences of the plea; the purported recantation evidence proffered at the hearing was very weak, and at the plea hearing, the defendant admitted under oath that the defendant committed two acts of aggravated assault. *Williams v. State*, 315 Ga. App. 704, 727 S.E.2d 532 (2012).

Double jeopardy did not bar retrial.

— Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., Amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon

and voluntary manslaughter were mutually exclusive. *Roesser v. State*, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Victim's apprehension of violent injuries.

Evidence was sufficient to uphold the defendant's conviction for aggravated assault because all of the victims were together in a group, and one of the victim's testified that guns were pointed at everybody; the defendant's act of firing the weapon into the group made each individual a separate victim, and testimony that the victims were crying and screaming when the defendant fired was sufficient for the jury to conclude that the group too had a reasonable apprehension of receiving a violent injury. *O.C.G.A. § 16-5-20(a)(2)*. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Rule of lenity. — Because attempted murder and aggravated assault were felonies under *O.C.G.A. §§ 16-4-6(a)* and *16-5-21(j)*, and because first- and third-degree cruelty to children could not be proven by the same evidence under *O.C.G.A. § 16-5-70(b)* and *(d)(2)*, the rule of lenity did not apply; therefore, the trial court properly denied the defendant's motion for a new trial. *Rolf v. State*, 314 Ga. App. 596, 724 S.E.2d 881 (2012).

Merger not appropriate.

Defendant's aggravated assault convictions did not merge because the counts of the indictment requiring the state to prove that the defendant slashed the victim's neck with a sharp-edged instrument, hit the victim with a hammer and wrapped a cord around the victim's neck with the intent to murder were based on different conduct and merger of those convictions was not required. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court was correct not to merge the defendant's convictions for armed robbery and aggravated assault because although the defendant's conviction for the armed robbery of the victim resulted from a holdup, the conviction for aggravated assault was based on the defendant's forcing the shotgun down the victim's throat later in a bathroom. *Thomas v. State*, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court did not err in failing to merge the defendant's aggravated assault convictions because, although the convictions arose from the same acts, the convictions did not merge as a matter of fact or law since each count was based upon harm to a different victim. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Aggravated assault and armed robbery convictions did not merge for sentencing purposes because the trial court was authorized to conclude that the assault with a gun was a separate act from the armed robbery, which occurred after the victim had been pistol-whipped. *Mcglasker v. State*, No. A12A2079, 2013 Ga. App. LEXIS 218 (Mar. 19, 2013).

Merger appropriate.

Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with intent to murder merged for sentencing because both counts of the indictment alleged that the defendant committed aggravated assault by slashing the victim's neck; although one count alleged that the assault was done with a deadly weapon and the other alleged that it was done with the intent to commit murder, *O.C.G.A. § 16-5-21(a)(1)* and *(a)(2)*, the counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck, and thus, the counts merely charged the same act of aggravated assault being committed in two of the multiple ways set out in *O.C.G.A. § 16-3-21*. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to *O.C.G.A. § 16-1-7(a)(1)*, based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's convictions for armed robbery and aggravated assault should have been merged for sentencing, as a co-defendant's actions, which occurred either concurrently or in rapid succession, were committed as part of one uninter-

rupted criminal transaction and in pursuit of a specific, predetermined goal: the armed robbery of a single victim. *Crowley v. State*, 315 Ga. App. 755, 728 S.E.2d 282 (2012).

Trial court erred in failing to merge defendant's conviction for aggravated assault into defendant's conviction for armed robbery. *Williams v. State*, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Merger with malice murder conviction.

Defendant's conviction on a second aggravated assault should have merged into the malice murder conviction because the victim sustained two shots to the arm and one fatal shot to the back of the head, and the evidence did not authorize the finding of an additional "deliberate interval" between the second shot to the arm and the shot to the head; both were inflicted in close succession as the defendant confronted the victim. *Ortiz v. State*, 291 Ga. 3, 727 S.E.2d 103 (2012).

Merger with felony murder. — Defendant's conviction for aggravated assault was not authorized because the count of the indictment that alleged aggravated assault had to be merged into the felony murder count; although the felony murder and the underlying felony were committed on different victims, the count of the indictment alleging felony murder set forth the aggravated assault against a victim as the underlying felony supporting the charge of felony murder. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Aggravated assault did not merge with armed robbery.

Trial court did not err when the court refused to merge the defendant's aggravated assault and armed robbery convictions because the armed robbery and aggravated assault were separate and distinct acts; the victim's testimony showed that the armed robbery was complete before the commission of the aggravated assault. *Brown v. State*, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Aggravated assault and armed robbery should merge.

Because the defendant's convictions for armed robbery and aggravated assault arose from the same act or transaction,

the defendant's taking money from the victim at gunpoint, the defendant's aggravated assault conviction against that victim merged with the armed robbery conviction. *Thomas v. State*, 289 Ga. 877, 717 S.E.2d 187 (2011).

Conviction for aggravated assault should have been merged with the defendant's conviction for armed robbery because the convictions both required proof of the same elements. *Bradley v. State*, No. S12A1857, 2013 Ga. LEXIS 259 (Mar. 18, 2013).

Parties to crime.

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

Evidence sufficient for conviction.

Evidence was sufficient to support a conviction for aggravated assault since, pursuant to O.C.G.A. § 16-5-21(a)(2), the defendant intentionally committed an act that placed an apartment resident in reasonable apprehension of immediately receiving a violent injury. *Craft v. State*, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Evidence was sufficient to support the defendant's conviction for aggravated assault because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Rational jury could find the defendant guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the state disproved the defendant's self-defense claim; the jury was entitled to reject the defendant's version of events, and even if the jury found that the victim threw a bottle at the defendant's car, the jury could have concluded that the defendant struck the victim after any danger had passed and that the defendant's response was excessive. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence where a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. *Harrelson v. State*, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Sufficient evidence showed the defendant committed aggravated assault, under O.C.G.A. § 16-5-21(a)(2), in the process of hijacking a victim's vehicle because: (1) the defendant showed a gun when the victim resisted the defendant's attempt to take the victim's car; (2) the victim grabbed the gun and tussled with the defendant showed a reasonable apprehension of harm; and (3) the victim was seriously injured. *Campbell v. State*, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. *Brown v.*

State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Evidence that the defendant was in the victim's home after a neighbor heard glass breaking and called 9-1-1, that a ribbon from the defendant's home was used to strangle the victim, that both the victim's and the defendant's DNA were on the ribbon, and that the victim's wedding ring was found in the defendant's pocket supported the defendant's convictions for aggravated assault. *Muhammad v. State*, 290 Ga. 880, 725 S.E.2d 302 (2012).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, possession of a firearm during the commission of a crime, and participation in criminal street gang activity. The defendant and fellow gang members walked toward a group of teenagers in a front yard while yelling and making gang signals; the defendant fired once into the crowd, killing the victim, who was unarmed; and the defendant, who fled the scene, was the only person who fired a weapon and was identified to police as the shooter by witnesses who knew the defendant by name. *Jackson v. State*, 291 Ga. 25, 727 S.E.2d 120 (2012).

Evidence was sufficient to support a finding that the defendant was guilty beyond a reasonable doubt of aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and possession of a firearm during the commission of a crime against another person, O.C.G.A. § 16-11-106(b)(1), because a witness and a friend testified that they had seen the defendant shoot the victim. *Redinburg v. State*, 315 Ga. App. 413, 727 S.E.2d 201 (2012).

Testimony that the defendant forced the defendant's way into a victim's house, kissed the victim against the victim's will, and attempted to pull the victim's pants down, stopping only when a car drove up, was sufficient to support the defendant's conviction for aggravated assault. *Murrell v. State*, 317 Ga. App. 310, 730 S.E.2d 675 (2012).

Sufficient evidence supported the defendant's aggravated assault conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim because:

(1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. *Bush v. State*, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Evidence sufficient for conviction of aggravated assault with gun.

Evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the defendant pointed an air pistol at the victim and threatened to kill the victim. *Leeks v. State*, 309 Ga. App. 724, 710 S.E.2d 908 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Aggravated assault and felony murder.

Jury was authorized to find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder during the commission of aggravated assault in the manner alleged in the indictment because at trial the medical examiner testified that the cause of the victim's death was suffocation; although the defendant told an ex-spouse over the phone that the defendant choked the victim, there was no other evidence to corroborate that statement while there was much physical and scientific evidence that pointed to the cause of death as suffocation. *Davis v. State*, 290 Ga. 421, 721 S.E.2d 886 (2012).

Withdrawal of guilty pleas properly denied.

Trial court did not err in denying the defendant's motion to withdraw the guilty

plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. *Carson v. State*, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Sentencing.

Defendant's life sentence for armed robbery was within the statutory limits, O.C.G.A. § 16-8-41(b), and the 20-year sentences imposed for the defendant's aggravated assaults were within the statutory range of punishment under O.C.G.A. § 16-5-21(b). Therefore, the sentences were not void, and the court had no basis for disturbing the sentences. *Gillespie v. State*, 311 Ga. App. 442, 715 S.E.2d 832 (2011).

Defendant's sentence, as a recidivist, of concurrent 20 year terms on each of three counts of aggravated assault, concurrent five year terms on each of three counts of possession of a firearm during the commission of a crime, to run consecutive to the aggravated assault sentence, and concurrent 15 year terms on each of two counts of possession of a firearm by a convicted felon, to run consecutive to the aggravated assault sentence, was not cruel, inhumane, and unusual punishment because each sentence was within the statutory limits of the crimes charged, and the sentence was not grossly disproportionate to the underlying crimes. *Willis v. State*, 316 Ga. App. 258, 728 S.E.2d 857 (2012).

Sentence authorized when defendant not allowed to withdraw guilty plea. — With regard to the defendant's convictions and sentences for rape, taking

a motor vehicle, burglary, aggravated assault, and robbery, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the defendant's guilty plea because, when entering the plea, the defendant knew that the state was seeking a life sentence, and the sentences were not void since the sentences did not exceed those authorized by law. *Andrews v. State*, 739 S.E.2d 445, No. A12A1874, 2013 Ga. App. LEXIS 142 (2013).

Prior conviction properly admitted. — Trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's prior aggravated assault conviction under O.C.G.A. § 24-9-84.1 because the trial court specifically addressed the relevant factors including the kind of felony involved, the date of the conviction, and the importance of the witness's credibility and properly considered the specific facts and circumstances of the defendant's prior aggravated assault conviction, as required by O.C.G.A. § 24-9-84.1(b), before concluding that the probative value of evidence of the conviction substantially outweighed the evidence's prejudicial effect; the statute itself contains no distinction between defendants and witnesses when more than ten years has passed since the applicable conviction or release. *Dozier v. State*, 311 Ga. App. 713, 716 S.E.2d 802 (2011), overruled on other grounds, *Clay v. State*, 290 Ga. 822, 725 S.E.2d 260 (2012).

Cited in *Russell v. State*, 319 Ga. App. 472, 735 S.E.2d 797 (2012); *Hyman v. State*, 320 Ga. App. 106, 739 S.E.2d 395 (2013).

Indictment

Consolidation of indictments proper. — Trial court properly consolidated the indictments charging the defendant with armed robbery, criminal attempt to commit armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and theft by receiving stolen property because joinder was not prejudicial or erroneous since evidence of the various, intertwined crimes would have been admissible against the defendant had the indictments been tried separately; the

trial court was authorized to find that the events in the indictments committed within a two-day period and involving guns and a car constituted a series of connected acts, and the connection between the robberies and the assaults helped identify the defendant. *Jackson v. State*, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

Indictment sufficient to charge aggravated assault.

In charging aggravated assault with a deadly weapon under O.C.G.A. § 16-5-21(a)(2) as the predicate offense to felony murder, it was sufficient for the indictment implicitly to allege the use of a hatchet as a weapon which, when used offensively, was likely to result in serious bodily injury. *Reed v. State*, 291 Ga. 10, 727 S.E.2d 112 (2012).

No fatal variance.

There was not a fatal variance between an allegation that the defendant committed aggravated assault against all three members of a group and evidence that defendant only struck one member of the group because: (1) the evidence showed all three were in a group when the defendant fired a gun at the group; and (2) it was well established that the act of firing a weapon into a group made each individual in the group a separate victim and justified a separate count of aggravated assault for each victim. *Martin-Argaw v. State*, 311 Ga. App. 609, 716 S.E.2d 737 (2011).

Sufficient to withstand general demurrer. — Indictment alleging that the defendant unlawfully made an assault upon a peace officer engaged in the performance of the officer's official duties with a motor vehicle, an object, which, when used offensively against a person, is likely to or actually does result in serious bodily injury, was sufficient to withstand a general demurrer because the defendant could not admit to the facts other than the fact that the individual was a peace officer without being guilty of the lesser included offense of aggravated assault. *State v.*

Wilson, 318 Ga. App. 88, 732 S.E.2d 330 (2012).

Included Crimes

Offense merged with attempted armed robbery.

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. *Garland v. State*, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Merger with armed robbery.

Trial court erred in not merging a defendant's aggravated assault with attempt to rob conviction, O.C.G.A. § 16-5-21(a), into the defendant's armed robbery conviction, O.C.G.A. § 16-8-41. The offense of armed robbery contained a requirement, the taking of property, that aggravated assault did not, but aggravated assault with intent to rob did not require proof of a fact which armed robbery did not. *Daniels v. State*, 310 Ga. App. 541, 713 S.E.2d 689 (2011).

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court's failure to merge the defendant's aggravated assault conviction with the defendant's armed robbery conviction in imposing the sentence was erroneous because there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery; both crimes required proof of an intent to rob because the elements of the defendant's armed robbery charge under O.C.G.A. § 16-8-41(a) included an intent to rob, the use of an offensive weapon, and the taking

of property from the person or presence of another, and the elements of the defendant's aggravated assault charge under O.C.G.A. § 16-5-21(a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Trial court erred by failing to merge an aggravated assault charge into an armed robbery charge because the victim testified repeatedly that the defendant was in the victim's apartment when the defendant shot the victim and that the victim fired a gun as soon as the victim saw the defendant point a gun at the victim while forcing the defendant's way in; both crimes were complete when the defendant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. *Davis v. State*, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. *Hall v. State*, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Trial court did not err in failing to merge the aggravated assault count of the indictment with the armed robbery count because the defendant knowingly and voluntarily pled guilty to each of the crimes for which the defendant was indicted, and as a consequence, the defendant waived all defenses except that the indictment charged no crime, including the issue of whether the offenses merged as a matter of law or fact; the defendant chose to admit that the defendant committed the

acts so the defendant could avoid a trial on the question of guilt or innocence, and having accepted the benefits of such a bargain, it would be contrary to public policy and the ends of justice to allow the defendant to avoid the consequences of the agreement. *Carson v. State*, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge with aggravated battery.

Separate judgments of conviction and sentences for aggravated assault, O.C.G.A. § 16-5-21(a)(2), and aggravated battery, O.C.G.A. § 16-5-24(a), were authorized because the evidence authorized a finding that the defendant committed an initial aggravated assault and, after a deliberate interval, committed an aggravated battery in a different location and on a different part of the victim's body; because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually. *Brockington v. State*, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Battery conviction merged into aggravated assault conviction. — Trial court correctly ruled that the defendant's conviction for battery merged into the defendant's conviction for aggravated assault because the felony of aggravated assault did not merge into the misdemeanor battery. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Merger of aggravated assault with malice murder.

Defendant's conviction for aggravated

assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Aggravated assault conviction should have merged into malice murder conviction because it was not clear there was any deliberate interval between the assaults. *Schutt v. State*, No. S12A2060, 2013 Ga. LEXIS 263 (Mar. 18, 2013).

Assault with Deadly Weapon

Assault with knife.

Evidence was sufficient to support the trial court's determination that the defendant committed the offense of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the defendant's attempt to harm a bar patron was transferred to the manager of the bar who was injured; when the defendant retrieved a knife and the manager saw the knife the defendant had committed an act that placed the manager in reasonable apprehension of immediately receiving a violent injury. *Brown v. State*, 313 Ga. App. 907, 723 S.E.2d 115 (2012).

Evidence was sufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the victim testified that the defendant held a knife when the defendant told the victim to take her clothes off and to open her legs so that the defendant could have vaginal intercourse with her against her will; pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), that testimony alone was sufficient to support the conviction. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Defendant was properly convicted of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the jury

was authorized to conclude that the large knife the defendant held, which was introduced into evidence, was a deadly weapon and that the knife could be easily removed from the knife's sheath; the defendant threatened the victim in a way that put the victim in reasonable apprehension of immediately receiving a violent injury. *Gunter v. State*, 316 Ga. App. 485, 729 S.E.2d 597 (2012).

Evidence was sufficient to support the defendant's convictions of aggravated assault, aggravated battery, and burglary because the evidence showed that: (1) the defendant broke into his ex-girlfriend's home; (2) the defendant stabbed the ex-girlfriend's current boyfriend in the spine with a knife, paralyzing him; (3) the defendant cut his ex-girlfriend with a knife on the back of her head, on the side of her face, on her shoulder and back, and stabbed her in the stomach; and (4) the ex-girlfriend continued to bear scars from the knife attack. *Jackson v. State*, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Defendant's convictions for armed robbery and aggravated assault were supported by sufficient evidence in that, even absent fingerprint evidence, there was the identifications of two eyewitnesses as well as a bottle bearing the store's logo and the amount of cash and same denomination reported stolen found on the defendant's person and the testimony of a victim that the defendant used a knife. *Hamlin v. State*, 320 Ga. App. 29, 739 S.E.2d 46 (2013).

Evidence before the jury that the defendant said the victim was still alive after the victim's throat was cut because the defendant heard gurgling and testimony from the medical examiner that the victim was not necessarily dead when the victim's throat was slit was sufficient to support the defendant's conviction for aggravated assault based on slitting the victim's throat. *Schutt v. State*, No. S12A2060, 2013 Ga. LEXIS 263 (Mar. 18, 2013).

Evidence sufficient for conviction.

Defendant's new trial motion based on insufficient evidence lacked merit, as the evidence was sufficient to support the defendant's convictions for aggravated assault and a weapons possession charge under O.C.G.A. §§ 16-5-21(a)(2) and

16-11-106(b)(1); issues of credibility regarding witnesses' identification of defendant as the shooter were within the jury's province pursuant to former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620). *Williams v. State*, 317 Ga. App. 248, 730 S.E.2d 726 (2012).

Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. *Platt v. State*, 291 Ga. 631, 732 S.E.2d 75 (2012).

Evidence that the defendant and others were present at the scene of the offense, shot at the victims' vehicle, and wounded two of the victims was sufficient to find the defendant guilty of aggravated assault. *Jones v. State*, 318 Ga. App. 26, 733 S.E.2d 72 (2012).

Identification of defendant. — Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. *Williams v. State*, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Assault With Gun

Stun gun.

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault, armed robbery, and attempted armed robbery because, during the confrontation, the defendant stated to one of the victims that the defendant had shot a person the day before; shooting the victims when the defendant was frustrated in the robbery attempts was consistent with the defendant's behavior toward

the other victims. *Lewis v. State*, 291 Ga. 273, 731 S.E.2d 51 (2012).

Sufficiency of circumstantial evidence.

Sufficient evidence existed to support the defendant's convictions for armed robbery and aggravated assault based on the victims' testimony that guns were used in the commission of the crimes, the testimony of the defendant's girlfriend and the presence of a cell phone found near the scene of the crimes, and the victims identifying the defendant's accent was sufficient for the jury to infer that the defendant was an armed participant in the crimes. *Jordan v. State*, No. A12A2286, 2013 Ga. App. LEXIS 163 (Mar. 11, 2013).

Evidence sufficient for assault with gun.

Evidence was sufficient to support the defendant's conviction for aggravated assault, under O.C.G.A. §§ 16-5-21(a)(1) and 16-5-21(a)(2), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to convict the defendant of aggravated assault, motor-vehicle hijacking, and possession of a firearm during the commission of a crime, under O.C.G.A. §§ 16-5-21(a)(2), 16-5-44.1(b), and 16-11-106(b)(1), because

the defendant waited in a getaway vehicle while an accomplice hijacked the victim's vehicle and possessed the gun that the accomplice used in the crime. *Gordon v. State*, 316 Ga. App. 42, 728 S.E.2d 720 (2012).

Sufficient evidence existed to support the defendant's convictions for aiding and abetting armed robbery, burglary, aggravated assault, and false imprisonment based on the evidence that the defendant was a party to the crimes, including evidence that the defendant drove the co-defendants to the house just before the crimes were committed; that the defendant was in the vehicle when plans to commit the crimes were discussed; that the defendant waited in the victim's driveway when the co-defendants entered the front door of the house, wearing masks and carrying guns; and that the defendant drove the perpetrators away from the scene after the crimes were committed—speeding, driving erratically, and not stopping when the police, with sirens and lights activated, began following the vehicle. *Simon v. State*, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here," while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. *Wright v. State*, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Evidence held sufficient.

Evidence was sufficient to support the defendant's conviction for aggravated assault, under O.C.G.A. § 16-5-21(a)(2), because the defendant knocked the victim face-down into a table, pointed a gun at the kneeling and bloodied victim, and threatened to kill the victim and the victim's children with the gun. The defendant later told the victim that the victim was going to commit suicide that night and forced the victim to swallow several unidentified pills. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Evidence was sufficient to authorize a rational trier of fact to find the defendant

guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a crime because the three men who were with the victim when the victim was shot identified the defendant as the person who fired shots at them; there was testimony that the defendant was the boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim and that the defendant and the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Evidence supported the defendant's convictions of felony murder during the commission of aggravated assault, aggravated assault, possession of marijuana, and possession of a firearm during the commission of a crime when: (1) after smoking marijuana, the defendant attacked the victim, pulled a gun from defendant's pocket, and shot the victim four times; (2) the victim told the police that the defendant did it; (3) the victim died; (4) a knife was found near the victim, the defendant had a stab wound, and the defendant claimed self-defense; and (5) witnesses one and two saw the defendant pull the gun but did not see the victim with a knife. *Hill v. State*, 291 Ga. 160, 728 S.E.2d 225 (2012).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary, after the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. *Brown v. State*, 291 Ga. 750, 733 S.E.2d 300 (2012).

Aiding and abetting in possession of firearm during aggravated assault.

— Based on the evidence that the defendant drove and deliberately followed the victims and pulled in behind the victims' vehicle, intentionally encouraged the

shooter by telling the shooter “you better not let these guys get away, go ahead and handle your business, do what you got to do,” and fled with the shooter after the shooting, the jury was authorized to conclude that the defendant was a party to the crimes of aggravated assault and possession of a firearm during the commission of a crime. *Talifero v. State*, 319 Ga. App. 65, 734 S.E.2d 61 (2012).

Evidence sufficient for aggravated assault of bus driver. — Trial court did not err in denying the defendant’s motion for a directed verdict after a jury found the defendant guilty of aggravated assault with a deadly weapon against a bus driver, O.C.G.A. § 16-5-21(a)(2), because the bus driver testified that the driver did not feel free to drive away since the driver felt the driver’s life was in danger; the driver testified that the driver chose not to drive away for fear that the defendant would shoot. *Cannon v. State*, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Evidence insufficient for conviction.

Evidence was insufficient to support the defendant’s conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because there was no affirmative evidence that a restaurant employee saw the defendant with a gun or heard the defendant’s threats to shoot; from an officer’s description of the scene, the officer did not personally observe the employee climb out of the drive-through window, and thus, the evidence that the employee climbed out of the window rested mainly on the veracity and competence of persons other than the testifying officer, making the testimony hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. § 24-8-801). *Santiago v. State*, 314 Ga. App. 623, 724 S.E.2d 793 (2012).

Evidence was insufficient to convict the defendant of aggravated assault and possession of a weapon during the commission of the crime; the defendant was out of the officer’s view when the defendant fired the gun, no other officer or witness saw the defendant fire the gun, no witness saw where the defendant aimed the gun when the defendant fired the gun, and no forensic or other evidence was introduced which suggested that the defendant fired

the gun in the officer’s direction. *Touchstone v. State*, 319 Ga. App. 477, 735 S.E.2d 805 (2012).

Assault With Automobile

Officer stepped backward to avoid being struck by car. — Evidence supported the defendant’s conviction for aggravated assault, under O.C.G.A. §§ 16-5-21(a)(2) and 16-5-21(c), because, when a police officer who was directing traffic approached the vehicle which the defendant was driving, the defendant pulled the vehicle out of the traffic, sped directly toward the officer, and then sped away. Furthermore, the officer specifically testified that the officer believed the vehicle would hit the officer and that the officer stepped backward to avoid being struck. *Myers v. State*, 311 Ga. App. 668, 716 S.E.2d 772 (2011).

Evidence of intent sufficient.

Evidence was sufficient to enable the jury to determine that the defendant was guilty of aggravated assault beyond a reasonable doubt because the jury was authorized to infer from the defendant’s conduct that the defendant had an intent to injure a driver or anybody who was in the defendant’s way while the defendant attempted to elude police; the defendant crashed into the driver’s car while the defendant led police on a high-speed chase in a stolen care. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Trial court erred in revoking probation pursuant to O.C.G.A. § 42-8-34.1 on the ground that the probationer committed an aggravated assault in violation of O.C.G.A. § 16-5-21 because there was insufficient evidence that the probationer committed an aggravated assault offense in violation of the terms of probation; there was no evidence supporting an aggravated assault based on an alleged victim’s apprehension of injury because even assuming that the probationer’s collision with another vehicle while evading an officer was the basis for the aggravated assault charge, there was no evidence as to the occupant’s apprehension of receiving an injury or as to his or her conduct showing the injury. *Klicka v. State*, 315 Ga. App. 635, 727 S.E.2d 248 (2012).

Assault With Hands, Fists, or Other Body Parts

Fists and feet may be deadly weapons.

Evidence was sufficient to convict the defendant of aggravated assault because although hands and feet were not considered per se deadly weapons within the meaning of O.C.G.A. § 16-5-21(a)(2), the jury could find them to be so depending on the circumstances surrounding their use, including the extent of the victim's injuries. *Lewis v. State*, 317 Ga. App. 218, 735 S.E.2d 1 (2012).

Evidence sufficient to show beating.

Evidence was insufficient to sustain a juvenile court's finding that a child committed aggravated battery in violation of O.C.G.A. § 16-5-24(a) because there was no showing that the child's ongoing memory and cognitive problems were caused by the beating and not by a preexisting brain tumor and brain surgeries; however, the evidence was sufficient to show an aggravated assault. In the Interest of Q. S., 310 Ga. App. 70, 712 S.E.2d 99 (2011).

Assault With Other Objects

Knives. — Sufficient evidence existed to support defendant's conviction for burglary, aggravated assault, and two counts of cruelty to children in the second degree based on the evidence adduced at trial that the defendant broke into the adult victim's apartment through a rear window and attacked the victim, stabbed the adult victim in the neck, dragged the victim down the hall, and stabbed the victim's hand, and although the defendant put a cloth over the victim's face at some point, the adult victim saw that the person stabbing the victim in the neck was the defendant, the victim's ex-boyfriend, and the victim positively and consistently identified the defendant as the perpetrator. *White v. State*, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

Razor blades. — Since the evidence showed the first defendant threatened to cut the victim and hit the victim with a razor blade in the defendant's hand, there was no error in the denial of the defendant's motion for a directed verdict on the

aggravated assault charge. *Griffin v. State*, 292 Ga. 321, 737 S.E.2d 682 (2013).

Use of a dog. — Officer's testimony that the defendant yelled to the defendant's dog "sic him boy, bite him" before the dog attacked the officer was sufficient to support the defendant's conviction for aggravated assault on a peace officer. *Brazier v. State*, 320 Ga. App. 6, 739 S.E.2d 13 (2013).

Possession of destructive device of offense did not merge with aggravated assault. — Defendant's aggravated assault convictions and the defendant's possession of a destructive device convictions did not merge because the possession of offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. *Mason v. State*, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Assault with Intent to Rob

No merger of related offenses.

Trial court did not err in sentencing defendant for aggravated assault of a victim, one with a deadly weapon and the other with intent to rob, because under the case law test, the two crimes did not merge since aggravated assault with intent to rob requires proof of a fact (the intent to rob) that aggravated assault with a deadly weapon does not, and aggravated assault with a deadly weapon requires proof of a fact (the use of a deadly weapon) that aggravated assault with intent to rob does not. *Thomas v. State*, 292 Ga. 429, 738 S.E.2d 571 (2013).

Trial court did not err in sentencing the defendant for both aggravated assault with intent to rob and felony murder because the aggravated assault with intent to rob charge required the state to prove that the defendant had the intent to rob, which the state did not need to prove for the felony murder conviction based on aggravated assault with a deadly weapon, and the felony murder count required the state to prove that the defendant caused

the death of the victim and used a deadly weapon, neither of which the state had to prove for the conviction of aggravated assault with intent to rob. *Thomas v. State*, 292 Ga. 429, 738 S.E.2d 571 (2013).

Merger required.

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. *Washington v. State*, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Evidence sufficient for conviction of robbery and assault.

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. *Clark v. State*, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Evidence was sufficient to support the defendant's convictions for armed robbery and aggravated assault when, in addition to accomplice testimony implicating the defendant, the descriptions of the defendant's clothing at the time of offenses offered by the accomplice and one of the victims were the same, and the driver of the vehicle in which the defendant left the area testified that, on the day of the robbery, the driver drove the defendant and the accomplice to an area near the location of the offenses, left the car, and upon the driver's return, the defendant and the accomplice were gone, another passenger told the driver to meet the defendant and

the accomplice at a gas station across from the scene of the offenses, and the defendant and the accomplice returned to the car at the gas station with a box full of change. *Love v. State*, 318 Ga. App. 387, 734 S.E.2d 95 (2012).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during commission of a felony. *Thompson v. State*, 739 S.E.2d 434, No. A12A2000, 2013 Ga. App. LEXIS 141 (2013).

Assault with Intent to Rape

Evidence sufficient for finding defendant guilty of assault with intent to rape.

Trial court did not err in denying the defendant's motion for a directed verdict on a charge of aggravated assault with intent to rape. The evidence that the defendant disrobed the victim, forced her onto a bed, and attempted to have intercourse with her before she pushed him off supported the conviction. *Rawls v. State*, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

Merger of attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Jury Instructions

Instruction on reckless conduct charge not warranted.

Defendant was not entitled to a jury

charge on the misdemeanors of reckless conduct, O.C.G.A. § 16-5-60(b), as a lesser included offense of the felony counts of aggravated assault because, although the defendant relied upon evidence that the defendant was intoxicated, the defendant cited no evidence that the defendant's intoxicated state was involuntary or that the intoxication resulted in any permanent brain function alteration. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Jury's consideration limited to facts alleged in indictment.

Trial court's jury charge on aggravated assault was not erroneous because the trial court properly tailored the court's charge to the allegation in the indictment by charging the jury with just the relevant portion of the simple assault statute, O.C.G.A. § 16-5-20(a)(1); the trial court did as the court was required and delivered a charge tailored to the indictment. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Failure to charge jury on simple assault, etc.

Because the defendant intentionally shot the victim, wounded the victim, chased the victim down, and intentionally shot the victim three more times as the victim begged for the victim's life, and as neither negligence nor reckless conduct was an issue, the trial court did not err by failing to instruct the jury on simple assault under O.C.G.A. § 16-5-20(a) in connection with the jury's charge on aggravated assault under O.C.G.A. § 16-5-21. *Cantera v. State*, 289 Ga. 583, 713 S.E.2d 826 (2011).

Appellate review of the trial court's decision not to give a charge on the lesser included offense of simple assault was waived because trial counsel admitted that counsel acquiesced and did not further object to the trial court's decision to not give the charge. *Gunter v. State*, 316 Ga. App. 485, 729 S.E.2d 597 (2012).

Charging jury on aggravated assault.

Trial court did not err in failing to define simple assault in the court's charge to the jury because although in the court's definition of felony murder based on aggra-

vated assault, the trial court did not include a definition of simple assault in the court's charge to the jury on aggravated assault, the trial court did cover the fundamentals of simple assault. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Defendant could not show that the trial court erroneously charged the jury as to aggravated assault, under O.C.G.A. § 16-5-21(a)(2), because the defendant helped induce the trial court into giving the aggravated assault jury charge about which the defendant complained and the charge as a whole was not erroneous in that the trial court's use of the language "actually does" was extraneous. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Trial court did not plainly err in the court's jury instruction on aggravated assault when the trial court's instructions included the definition of aggravated assault with a deadly weapon in O.C.G.A. § 16-5-21(a)(2) and tracked the applicable definition of simple assault in O.C.G.A. § 16-5-20(a)(1). *Scott v. State*, 290 Ga. 883, 725 S.E.2d 305 (2012).

Failure to give charges on simple assault and reckless conduct not error.

— Trial court did not err when the court refused to charge the jury on simple assault and reckless conduct as lesser included offenses of aggravated assault because the defendant failed to raise a question of fact as to whether the defendant assaulted the victim with a gun and there was no evidence suggesting that the gun went off accidentally. *Johnson v. State*, 739 S.E.2d 469, No. A12A2510, 2013 Ga. App. LEXIS 143 (2013).

Charge that tracked the assault language of O.C.G.A. § 16-5-21(a)(2), under which the defendant was indicted, and addressed the specific instrument of the assault that was alleged in the indictment was proper. *Brazier v. State*, 320 Ga. App. 6, 739 S.E.2d 13 (2013).

Trial court's charge on aggravated assault was not erroneous because the court did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense; the trial court's charge tracked the suggested pattern charge on aggra-

vated assault. *Clayton v. State*, 319 Ga. App. 713, 738 S.E.2d 299 (2013).

Instruction on voluntary manslaughter not warranted.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). *Davidson v. State*, 289 Ga. 194, 709 S.E.2d 814 (2011).

Lesser included offense of pointing gun at another.

Defendant was not entitled to a jury charge on the misdemeanors of pointing a gun at another, O.C.G.A. § 16-11-102, as a lesser included offense of the felony counts of aggravated assault because the victims were placed in reasonable apprehension of immediately receiving a violent injury when defendant pointed a gun at the victims; the only testimony was that the weapon was pointed as a threat and perceived as such, and therefore, an assault. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Declining defendant's requested instruction held not error.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided

evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Self-defense instruction based on statutory language upheld.

Trial court did not err by refusing to charge the jury on the affirmative defense of self defense because defendant never admitted to the crimes alleged and, in fact, denied even being present during the assault of the victim; therefore, there was no evidence to support the giving of the requested charge. *Ransom v. State*, 318 Ga. App. 764, 734 S.E.2d 761 (2012).

Jury charge on defense of habitation.

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Offensive weapon. — Defendant failed to preserve for appellate review the defendant's contention that the trial court erred in using the "offensive weapon" definition of O.C.G.A. § 16-8-41(a) as armed robbery was not one of the charged offenses because the defendant did not object to the charge and expressly declined the trial court's offer to recharge the jury. The charge did not constitute plain error because the definition of "offensive weapon" applicable to armed robbery mirrored very closely the definition of aggravated assault set forth in O.C.G.A. § 16-5-21(a)(2), and an "offensive

weapon” under the armed robbery statute necessarily would fall within the category of weapons described in § 16-5-21(a)(2), and therefore the defendant could not show that the instruction affected the outcome of the proceedings. *Jackson v. State*, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Charge did not omit nexus between violence and gang activity. — With regard to defendant’s convictions for aggravated assault and gang-related crimes, the trial court did not commit plain error

with regard to its jury instructions because the trial court correctly stated the law by using the statutory language in the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-4(a), in its charge to the jury, so the charge did not omit a nexus between the violence, and it was not possible for the jury to convict defendant without finding that nexus. *Skinner v. State*, 318 Ga. App. 217, 733 S.E.2d 506 (2012).

RESEARCH REFERENCES

ALR. — Parts of human body, other than feet, as deadly or dangerous weapons or instrumentalities for purposes of stat-

utes aggravating offenses such as assault and robbery, 67 ALR6th 103.

16-5-23. Simple battery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION JURY INSTRUCTIONS

General Consideration

Indictment charging involuntary manslaughter sufficiently alleged essential elements of simple battery. —

Trial court committed no error in allowing the state to amend an indictment to charge involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a), rather than voluntary manslaughter, because the language of the indictment alleged an offensive use of the fists that resulted in bodily injury, and thus, sufficiently alleged all of the essential elements of simple battery; the indictment alleged that the defendant caused the death of the victim by striking the victim with a fist contrary to the laws of the state, the good order, peace, and dignity thereof and, accordingly, the lesser offense of involuntary manslaughter in the commission of the unlawful act of simple battery was included as a matter of fact in the charged greater offense of voluntary manslaughter. *Morris v. State*, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

Evidence sufficient to support con-

viction. — Sufficient evidence supported a defendant’s convictions of robbery under O.C.G.A. § 16-8-40 and simple battery under O.C.G.A. § 16-5-23 since: (1) the defendant grabbed the victim by the throat, put the victim against a wall, and threw the victim onto a table; (2) the victim got a knife; (3) the defendant ran, taking the victim’s gaming system and marijuana; and (4) the defendant’s claim that the state’s main witnesses were not credible was rejected as credibility was a jury matter. *Slan v. State*, 316 Ga. App. 843, 730 S.E.2d 565 (2012).

Evidence insufficient for conviction.

Although an officer alleged that the defendant threw the defendant’s elbows back and forth, evidence was insufficient to support the defendant’s conviction for simple battery because the state failed to prove the necessary element of contact. *Ewumi v. State*, 315 Ga. App. 656, 727 S.E.2d 257 (2012).

Officer lacked probable cause to arrest the defendant for battery because a struggle between the defendant and the officer

ensued only after the officer attempted to unlawfully arrest defendant for obstruction. Defendant was justified in resisting the unlawful arrest with all force that was reasonably necessary to do so. *Ewumi v. State*, 315 Ga. App. 656, 727 S.E.2d 257 (2012).

Restitution authorized. — Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred, and even if others at the scene could have also kicked the victim, that did not negate the defendant's liability for damages caused by the defendant's role in the attack. *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011), cert. denied, No. S12C0949, 2012 Ga. LEXIS 555 (Ga. 2012).

Cited in *Futch v. State*, 316 Ga. App. 376, 730 S.E.2d 14 (2012).

Jury Instructions

Refusal to give requested charge not error. — Trial court did not err in

refusing to give the defendant's requested jury charge that consent or lack thereof was an element of simple battery because the trial court correctly charged the jury by quoting the statutory language in O.C.G.A. § 16-5-23(a)(1), and the defendant was allowed to present a consent defense to the jury as a challenge to the "insulting or provoking nature" element. *Redding v. State*, 318 Ga. App. 84, 733 S.E.2d 383 (2012).

Charging jury as to lesser included offenses.

Trial court did not err in failing to charge the jury on simple battery, O.C.G.A. § 16-5-23, as a lesser included offense of cruelty to a child in the first degree, O.C.G.A. § 16-5-70(b), because the evidence did not authorize such a charge; if the jury believed that an accident occurred, no battery was committed, but if the jury accepted the state's evidence, then the jury was authorized to find that the defendant intentionally assaulted the victim, thereby maliciously causing the victim cruel and excessive physical pain. Furthermore, there was no written request to charge on simple battery in the record on appeal. *Elrod v. State*, 316 Ga. App. 491, 729 S.E.2d 593 (2012).

16-5-23.1. Battery.

JUDICIAL DECISIONS

Battery conviction merged into aggravated assault conviction. — Trial court correctly ruled that the defendant's conviction for battery merged into the defendant's conviction for aggravated assault because the felony of aggravated assault did not merge into the misdemeanor battery. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Family violence battery.

Because there was evidence to support each fact necessary to make out the state's case, the jury was authorized to find that the defendant was guilty beyond a reasonable doubt of family violence battery, O.C.G.A. § 16-5-23.1, criminal trespass, O.C.G.A. § 16-7-21, and abuse of an elder

person, O.C.G.A. § 30-5-8; the victim's recollection of what occurred on the night at issue was contradicted by the victim's contemporaneous statements to neighbors and the police, as well as the victim's statements to the daughter the next morning that the defendant had grabbed the victim by the arm and twisted the arm, thereby causing the wound and other bruises. *Laster v. State*, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Evidence was insufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of family violence battery, O.C.G.A. § 16-5-23.1(f), because the state failed to establish the severity of harm required for

the offense of battery under § 16-5-23.1(a); the victim's testimony that the defendant "put his hand" on the victim's neck fell short of the evidence required to permit a reasonable trier of fact to infer that the victim suffered substantial physical harm or visible bodily harm. *Futch v. State*, 316 Ga. App. 376, 730 S.E.2d 14 (2012).

Similar transaction evidence properly admitted.

Trial court acted within the court's discretion in finding that a sufficient similarity existed between a prior transaction and family violence battery, O.C.G.A. § 16-5-23.1(f), so that proof of the former tended to prove the latter because in both instances the defendant became enraged and reacted impulsively and aggressively in response to a perceived challenge from a woman, and the prior transaction tended to disprove the defendant's claim of self-defense. *Jones v. State*, 316 Ga. App. 442, 729 S.E.2d 578 (2012).

Trial court acted within the court's discretion in finding that a sufficient similarity existed between prior transactions and family violence battery, O.C.G.A. § 16-5-23.1(f), so that proof of the former tended to prove the latter because the prior transactions involved a female victim who had an intimate relationship with the defendant; both prior transactions involved the defendant reacting violently and disproportionately in response to little or no provocation. *Jones v. State*, 316 Ga. App. 442, 729 S.E.2d 578 (2012).

Evidence was sufficient

Defendant's battery conviction under O.C.G.A. § 16-5-23.1(b) was supported by evidence that the defendant struck the victim in the eye with the defendant's hand, causing the eye to swell. A charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b), was not warranted because there was no evidence that the defendant fired a gun negligently; the only evidence was that the defendant fired several shots at the victim. *Tiller v. State*, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Jury was authorized to find the defendant guilty of family violence battery, O.C.G.A. § 16-5-23.1(f), battery, O.C.G.A. § 16-5-23.1(a), and disorderly conduct be-

cause the prior inconsistent statements of the defendant's wife constituted substantive evidence upon which the jury could rely in reaching a verdict; the wife had told officers that she had attempted to leave but that the defendant would not let her, and that he had hit her. *Kemp v. State*, 314 Ga. App. 730, 726 S.E.2d 447 (2012).

Evidence was sufficient to support conviction. — Court found that the evidence that the defendant punched the defendant's spouse in the ear, knocking the spouse out of bed and causing the spouse harm, i.e., redness and swelling, that was observed by both the spouse's father and the responding officer, was sufficient to sustain the defendant's conviction for family violence battery under O.C.G.A. § 16-5-23.1(f)(1). *Walker v. State*, 315 Ga. App. 821, 728 S.E.2d 334 (2012).

Charging jury on entire code section. — Trial court charged the jury on the entire battery code section, including the requirement that the defendant commit substantial physical harm, even though the defendant was only charged with committing visible bodily harm; this was not error because the charge as a whole limited the jury to considering the crime as charged in the indictment. *Tiller v. State*, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Jury instruction on prior difficulties. — Trial court did not err by failing to give a limiting instruction before admitting evidence of prior difficulties because the defendant's trial counsel did not request a limiting instruction on the prior difficulties, and the trial court instructed the jury on prior difficulties evidence in the final jury charge. *Kemp v. State*, 314 Ga. App. 730, 726 S.E.2d 447 (2012).

Consecutive sentences affirmed. — Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant's guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial

court's discretion. *Osborne v. State*, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

16-5-24. Aggravated battery.

JUDICIAL DECISIONS

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General Consideration

Causation.

In 1985, the Georgia legislature passed an Act “[t]o amend [the Code] relating to crimes of battery, so as to define the crime of ... aggravated battery upon a correctional officer [and] to define the term correctional officer.” This language indicated that the Georgia General Assembly intended to create a “separate and distinct crime” from aggravated battery rather than a separate, enhanced penalty based on the victim’s status at the time of the battery. Thus, because aggravated battery of a correctional officer is a distinct crime, the offense requires proof of the essential element of knowledge on the part of the defendant that the individual was a correctional officer at the time of the battery. *Taylor v. State*, 319 Ga. App. 850, 738 S.E.2d 679 (2013).

Failure to show victim was a correctional officer. — Trial court erred in denying the defendant’s motion for a directed verdict as to aggravated battery of a correctional officer because the state failed to establish evidence that the victim was a correctional officer within the definition of O.C.G.A. § 16-5-24(e)(2); the victim was wearing civilian clothes at the time of the offense and had only been working at the facility for five months. *Taylor v. State*, 319 Ga. App. 850, 738 S.E.2d 679 (2013).

Aggravated battery merged with attempted murder. — Trial court erred in failing to merge the offense of family violence aggravated battery with attempted murder, as both convictions were established by the same conduct. *Hernandez v. State*, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Merger with reckless conduct.

Because a charge under O.C.G.A. § 16-5-24(a) for aggravated battery required showings of malice and disfigurement, while the charge under O.C.G.A. § 16-5-60(b) for reckless conduct did not require any more proof beyond showing the defendant shot the victim causing bodily harm, the reckless conduct charge should have merged into the aggravated battery charge as a matter of fact. *DeLeon v. State*, 289 Ga. 782, 716 S.E.2d 173 (2011).

Aggravated assault merged into aggravated battery.

Defendant’s aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim’s hand and one of the victim’s fingers being rendered useless when the victim placed the victim’s hands up in an attempt to protect the victim’s head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge with aggravated battery.

Separate judgments of conviction and sentences for aggravated assault, O.C.G.A. § 16-5-21(a)(2), and aggravated battery, O.C.G.A. § 16-5-24(a), were authorized because the evidence authorized a finding that the defendant committed an initial aggravated assault and, after a deliberate interval, committed an aggravated battery in a different location and

on a different part of the victim's body; because each offense required proof of a fact that the other offense did not, the crimes did not merge legally or factually. *Brockington v. State*, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

State failed to present any evidence of venue. — State failed to present any evidence of venue because Liberty County was not mentioned by any witness, and the state showed only that the crime of aggravated assault occurred on a certain street, but the fact that the prosecutor noted in the opening statement that the street was a block from the Liberty County Courthouse did not establish that the crime scene was in Liberty County; the state's photographic evidence failed to establish that the crime occurred in Liberty County because the photograph contained nothing that indicated the city, county, or state in which the area depicted was located. *Bizzard v. State*, 312 Ga. App. 185, 718 S.E.2d 52 (2011).

Cited in *Day v. State*, 317 Ga. App. 243, 730 S.E.2d 734 (2012).

Application

Fractured arm rendering hand useless. — Evidence was sufficient to support a defendant's conviction for aggravated battery based on testimony that the defendant struck the victim with a stick, fracturing the victim's arm above the wrist and rendering the victim's left hand useless. *Dean v. State*, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Injury to finger and eye. — Defendant's aggravated battery convictions did not merge because the counts of the indictment were predicated on different conduct; in order to prove one count of the indictment, the state had to show that the victim threw bleach in the victim's eyes, and in order to prove another count of the indictment, the state had to prove that the victim's finger was rendered useless because the finger was repeatedly struck with a hammer. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Legs rendered useless.

Evidence was sufficient to support the defendant's aggravated battery conviction under O.C.G.A. § 16-5-24(a) because the medical evidence regarding the shooting

victim's rehabilitation and the victim's ongoing gait impairment was sufficient to allow the jury to conclude that the victim's legs were rendered useless by the shooting. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Evidence sufficient for aggravated battery because hot bleach thrown on victim.

Evidence was sufficient to support the defendant's convictions for aggravated battery, O.C.G.A. § 16-5-24(a), first degree cruelty to children, O.C.G.A. § 16-5-70(b), and second degree cruelty to children, O.C.G.A. § 16-5-70(c), because the victim stated in a forensic interview and testified at trial that the defendant had burned the victim with hot water on more than one occasion and that the defendant had slapped the victim's face and punched the victim in the stomach; the victim was admitted to the hospital with severe burns on the feet, buttocks, and scrotum, and the victim's mother testified that the victim had been under the defendant's care at the time the victim received the burns. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Victim with cognitive and memory losses. — Evidence was insufficient to sustain a juvenile court's finding that a child committed aggravated battery in violation of O.C.G.A. § 16-5-24(a) because there was no showing that the victim's ongoing memory and cognitive problems were caused by the beating and not by a preexisting brain tumor and brain surgeries. In the Interest of Q. S., 310 Ga. App. 70, 712 S.E.2d 99 (2011).

Evidence authorized finding of serious disfigurement.

Evidence was sufficient to support defendant's aggravated battery conviction, which was based upon the serious disfigurement of the victim's eye. The jury was authorized to find that the victim's severely swollen, bruised eye and eye socket fracture constituted serious disfigurement. *Feagin v. State*, 317 Ga. App. 543, 731 S.E.2d 778 (2012).

Sufficient injury to warrant conviction for aggravated battery.

Evidence was sufficient to support the defendant's conviction for aggravated battery, O.C.G.A. § 16-5-24(a), because the

evidence was sufficient for the jury to determine that the defendant caused the victim to sustain visible, severe burns and large hypertrophic scars on the victim's skin, which required ongoing surgeries and corrective procedures; because the evidence established that the defendant caused the victim's skin to be seriously disfigured, burned, and scarred, the aggravated battery conviction was authorized. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Trial court did not err in convicting the defendant of aggravated battery because the evidence was sufficient for any rational trier of fact to conclude beyond a reasonable doubt that the defendant's blows rendered the victim's mouth and jaw useless and that the defendant was guilty of aggravated battery beyond a reasonable doubt; the victim testified that the victim's jaw did not function normally after the victim was injured. *Tidwell v. State*, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Evidence was sufficient to support the defendant's convictions of aggravated assault, aggravated battery, and burglary because the evidence showed that: (1) the defendant broke into his ex-girlfriend's home; (2) the defendant stabbed the ex-girlfriend's current boyfriend in the spine with a knife, paralyzing him; (3) the defendant cut his ex-girlfriend with a knife on the back of her head, on the side of her face, on her shoulder and back, and stabbed her in the stomach; and (4) the ex-girlfriend continued to bear scars from the knife attack. *Jackson v. State*, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Evidence sufficient to support conviction.

Evidence was sufficient to support the defendant's conviction for aggravated battery, under O.C.G.A. § 16-5-24(a), because the defendant knocked the victim face-down into a table, pointed a gun at the kneeling and bloodied victim, and threatened to kill the victim and the victim's children with the gun. The victim lost sight and required surgery to correct all the facial fractures which the victim suffered. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Evidence was enough to prove beyond a reasonable doubt that the defendant committed aggravated battery in violation of O.C.G.A. § 16-5-24 because the defendant acted intentionally and without provocation or justification when the defendant struck the victim; the defendant physically assaulted the victim and repeatedly told the victim that the defendant was going to kill the victim, and the defendant hit the victim in the face with such force that the victim lost consciousness. *Bizzard v. State*, 312 Ga. App. 185, 718 S.E.2d 52 (2011).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary after the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. *Brown v. State*, 291 Ga. 750, 733 S.E.2d 300 (2012).

Victim's testimony that defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. *Garmon v. State*, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Evidence sufficient for aggravated battery against child.

The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's

10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Sentencing.

It was not erroneous for the trial court to impose a sentence of 20 years for aggravated battery, O.C.G.A. § 16-5-24, because after the defendant's kidnapping conviction was voided, the trial court was authorized under O.C.G.A. § 17-10-1 to sentence the defendant to a term of years on the aggravated battery count, which could consist of up to 20 years. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Trial court did not err by correcting the court's written sentence to conform with its oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Jury Instructions

Instructions to jury.

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack

the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Even though the trial court erred by mistakenly labeling the crime as aggravated assault before reading the charge for aggravated battery, the error was not reversible because the trial court went on to state that the crime at issue was aggravated battery and accurately read the substance of the count to the jury. In addition, a written copy of the indictment went out to the jury and the verdict form accurately listed the count as aggravated battery. *Jackson v. State*, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Instruction on accident. — In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming *arguendo* that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error, as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Trial court did not err by refusing to charge the jury on the affirmative defense of self-defense because the defendant never admitted to the crimes alleged and, in fact, denied even being present during the assault of the victim; therefore, there was no evidence to support the giving of the requested charge. *Ransom v. State*, 318 Ga. App. 764, 734 S.E.2d 761 (2012).

16-5-27. Female genital mutilation.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this

Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 3

KIDNAPPING, FALSE IMPRISONMENT, AND RELATED OFFENSES

16-5-40. Kidnapping.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RELATIONSHIP TO OTHER OFFENSES

JURY INSTRUCTIONS

PUNISHMENT

APPLICATION

General Consideration

“Asportation” of the victim, etc.

Evidence was sufficient to sustain defendant’s kidnapping conviction based on defendant’s jumping into a soft drink delivery truck and forcing the driver at gunpoint to drive more than six miles from a lighted parking lot to a secluded dirt road, thereby isolating the driver and making it less likely that anyone would discover the driver’s predicament and come to the driver’s aid. *Howard v. State*, 310 Ga. App. 659, 714 S.E.2d 255 (2011).

Defendant’s movement of a victim from the outside of a storage unit to inside the unit, where the defendant produced a knife and attempted to rape the victim, was sufficient to show asportation as required under the kidnapping statute, O.C.G.A. § 16-5-40(a). Although the movement was of brief duration, the movement was not an inherent part of the other offenses. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Relationship to Other Offenses

No merger of kidnapping and robbery by intimidation.

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim’s personal belongings, the defendant’s convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge;

pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. *Aldridge v. State*, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Kidnapping and false imprisonment all separate offenses.

Defendant’s conviction for false imprisonment did not merge with the offense of kidnapping since the kidnapping occurred when the defendant forced the victim to move to a secluded location and held the victim there against the victim’s will. After the defendant raped the victim, the defendant falsely imprisoned the victim on the premises by shoving the victim to the ground and ordering the victim to remain under threat of violence while the defendant escaped. These two events were separate in time and supported by separate facts. Consequently, the acts constituted separate offenses which did not merge. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Jury Instructions

Failure to instruct on false imprisonment not harmless. — Defendant’s conviction for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) was reversed because the trial court erred in failing to charge the jury on the lesser-included offense of false imprisonment, O.C.G.A. § 16-5-41(a); there was some evidence from which the jury could have convicted the defendant on the lesser-included offense, and the evidence of kidnapping was not so overwhelming so

as to render the trial court's failure to give the charge harmless. *Curtis v. State*, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

Punishment

No merger with aggravated assault.

Trial court did not err in declining to merge under O.C.G.A. § 16-1-7(a) kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Mandatory minimum sentence. — O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), as applied to the defendant, did not violate due process because an earlier indictment charged regular kidnapping and, only after plea negotiations failed, was the more severe sentence included in a re-indictment because such circumstances did not raise a presumption of prosecutorial vindictiveness in the absence of actual evidence thereof. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2) do not violate equal protection by punishing a person differently depending on the age of the victim because that classification is not arbitrarily drawn and instead is rationally related to the legitimate governmental interest in protecting children. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Sentence proper.

Trial counsel did not render ineffective assistance by failing to raise the constitutionality of the defendant's mandatory minimum sentence of 25 years imprisonment without parole, as codified in O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), because the defendant's concurrent 25-year sentences for child kidnapping did not raise a threshold inference of gross disproportionality; after beating the mother in the young children's presence so severely as to break her jaw and cause other injuries, the defendant

ordered all three of the victims to enter a car, drove the victims away, and left the victims in a location where the victims were isolated and unprotected. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Cruel and unusual punishment claim waived on appeal. — Defendant's appeal of an order denying the defendant's motion for new trial was transferred to the court of appeals because the claim that the defendant's sentence under O.C.G.A. § 16-5-40(d)(4) for kidnapping with bodily injury violated the cruel and unusual punishments clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. XVII, did not invoke the supreme court's constitutional question jurisdiction under Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1); because the cruel and unusual punishment claim was not timely raised in the trial court, review of the claim's merits was waived on appeal. *Brinkley v. State*, 291 Ga. 195, 728 S.E.2d 598 (2012).

Application

Evidence sufficient to support conviction.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

When the second victim was moved from the front door, through the house, and into the bedroom the element of asportation was established; the movement enhanced the defendant's control over the second victim and isolated the second victim from protection or potential rescue. *Goolsby v. State*, 311 Ga. App. 650, 718 S.E.2d 9 (2011).

Evidence fully supported the defendant's kidnapping convictions because the defendant forced the victims into a bathroom after the defendant had robbed two other victims, and the movement was not an integral part of the armed robbery offenses; herding the victims into the small and confined bathroom made it easier for the defendant to control the victims, thus making the situation more dangerous for the victims. *Thomas v. State*, 289 Ga. 877, 717 S.E.2d 187 (2011).

Because the driver of a delivery truck was forced at gunpoint by defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40, the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. *Sipplen v. State*, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Sufficient evidence supported the defendant's conviction for kidnapping because, even if the victim's entry into the defendant's truck was voluntary, the defendant did so under the mistaken belief that the defendant would take the victim to the hospital, and the victim attempted to escape further attack after the defendant stopped on the side of the road; at that point, the defendant caught the victim, again stabbed the victim numerous times, and dragged the victim by the legs into a ditch, effectively concealing the victim from passing traffic, when the victim was unable to move or otherwise resist. *Calloway v. State*, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

As to three victims, the evidence was sufficient to support the kidnapping counts because the victims were removed from bedrooms and taken to the living room where the victims were restrained. The movement of those victims was not an inherent part of the burglary, armed robbery, or firearm offenses as it was not necessary to effect the completion of those crimes. *Holder v. State*, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Evidence which included DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video

of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. *Glaze v. State*, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Testimony of the female victim and the accomplice that the defendant held a pistol on both victims and demanded and took cash from the male victim, along with the DNA evidence on the floor at the scene of the rape, was sufficient for the jury to find that the defendant was guilty of kidnapping with bodily injury (by rape) and rape against a female victim and kidnapping and armed robbery against a male victim. *Brinkley v. State*, No. A12A2322, 2013 Ga. App. LEXIS 169 (Mar. 11, 2013).

Defendant's movement of the victim was not merely incident to any other offense and was sufficient to establish asportation as the movement of the victim took place after the defendant grabbed the victim and lifted the victim and moved the victim from the victim's aunt's backyard and down the alley, passing at least three houses. *Thomas v. State*, 320 Ga. App. 101, 739 S.E.2d 417 (2013).

Evidence insufficient to support conviction.

When the first victim was forced back "just a few steps" to the couch, the movement occurred before the rape and was incidental and in furtherance of the rape, and the movement was not a necessary element of the rape, the evidence did not support the defendant's conviction for kidnapping with bodily injury. *Goolsby v. State*, 311 Ga. App. 650, 718 S.E.2d 9 (2011).

Insufficient evidence of asportation.

Evidence on a kidnapping charge was insufficient to satisfy the element of asportation because the movement of the victim was of short or minimal duration, occurring during the course and incidental to assaults upon the victim; the movement occurred after the assault on the victim had begun when the victim attempted to fight back against the attackers, and the attackers were struggling to

regain control over the victim and subdue the victim, but as soon as the victim was subdued and bound, the victim was returned to the room where the assault on the victim's person continued. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Defendant was entitled to reversal of a conviction for kidnapping under O.C.G.A. § 16-5-40(a) because the victim's movement did not constitute the necessary asportation; the act of forcing the victim from a standing position to laying on the floor was merely a positional change of minimal duration that occurred while the burglary and armed robbery were in progress and were incidental to those crimes. *Wilson v. State*, 318 Ga. App. 37, 733 S.E.2d 345 (2012).

As to one of the four victims, the evidence was insufficient to support the kidnapping count because the duration of the movement was minimal and it was incidental to the other crimes; the subject victim was already in the living room and simply made to sit down there. *Holder v. State*, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Sufficient evidence of asportation.

Evidence was sufficient to prove the element of asportation and to support the defendant's kidnapping conviction where the defendant snatched the victim from the sidewalk, forced the victim across a parking lot and onto the premises of a restaurant, took the victim up a flight of stairs to a secluded deck where the victim could not be seen, and then raped the victim. Although the duration of the movement was relatively short, and although the movement facilitated the rape, the movement did not constitute an inherent part of that rape. The defendant's movement of the victim substantially isolated the victim from protection or rescue. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Movement at issue was sufficient evidence of asportation because, after the defendant assaulted the victim, the defendant forced the severely injured victim at gunpoint to leave the victim's house, walk through a trail behind the house to a secluded wooded area, made the victim kneel on the ground on the victim's hands

and knees, and for a significant period of time threatened to kill the victim or the victim's children as the victim begged for the victim's life. The defendant's actions further isolated the victim, thereby creating additional danger to the victim and removing the victim from the possibility of rescue or escape, and reinforced the defendant's control over the victim. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

There was sufficient evidence of asportation to support the defendant's kidnapping convictions because, after the defendant robbed the cash register, the defendant forced the victims to move from the front of the store to the back of the store and later further back into an office; the further movement into the back office occurred after the robbery was completed, and that movement was not a necessary or inherent part of the robbery but created additional danger to the victims. *Green v. State*, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

Defendant's act of dragging the victim by the hair inside a house to begin an attack anew, after the victim temporarily managed to escape and was screaming for help, was sufficient evidence of asportation to support the defendant's kidnapping conviction because although the movement was arguably of minimal duration, the act was not an inherent part of the violent attack that the victim had endured; instead, the defendant's act allowed the defendant to reassert control over the victim and to reinitiate the savage beating without interference, further isolating the victim from rescue and increasing the victim's risk of harm. *Curtis v. State*, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

Defendant's act of grabbing one victim by the throat and pulling that victim from the kitchen into the living room was sufficient evidence of asportation to support the defendant's kidnapping conviction. The defendant's act of dragging the other victim inside the home to resume a beating was sufficient evidence of asportation as to that victim. Although the duration of the movement was brief, each act allowed the defendant and the co-defendant to

control their victims without interference, further isolating the victims from rescue and increasing the risk of harm. *Tolbert v. State*, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

Evidence was sufficient to establish the asportation element of the defendant's kidnapping convictions because the defendant's removal of children from their bedrooms by gunpoint and into the kitchen was not an inherent part of the crimes as the children's movement to the kitchen was not necessary to effect the completion of the burglary, armed robbery, or aggravated assault; also, by moving the children from their rooms, the children were placed in greater danger because the defendant and the accomplice's control over the children was enhanced. *Patterson v. State*, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Because the defendant moved the victims from the front of a pawn shop into a back office in order to isolate the victims from outside view and to significantly decrease the chance that the victims could summon assistance, the element of asportation was satisfied; therefore, the defendant was properly convicted of kidnapping under O.C.G.A. § 16-5-40. *Onumah v. State*, 313 Ga. App. 269, 721 S.E.2d 115 (2011).

All four factors that had to be considered in determining whether the asportation element of kidnapping was met had been satisfied because the duration of the movement of the victims to a car and while riding therein occurred after the offense of aggravated assault was completed; the movement presented a significant danger to the victims apart from the separate offense because it enhanced the defendant's control over the victims,

serving substantially to isolate the victims from protection or rescue and increasing the risks that further injury would occur in the event of an attempted escape and that the victims would be taken to a second location. *Jones v. State*, 290 Ga. 670, 725 S.E.2d 236 (2012).

Evidence was sufficient to establish the asportation element of the defendant's kidnapping with bodily injury conviction because movement occurred when the defendant pressed a knife to the victim's throat and forced the victim from the kitchen into the bedroom where the defendant raped and sodomized the victim and committed armed robbery; the movement was not an inherent part of the crimes because the victim's movement to the bedroom was not necessary to effect the completion of the rape, aggravated sodomy, or armed robbery. *Holden v. State*, 314 Ga. App. 36, 722 S.E.2d 873 (2012).

State proved the existence of "asportation," one of the essential elements of kidnapping with bodily injury, as the victim was forcibly moved at gunpoint from the front of the house to a back bathroom and that the movement did not occur during the commission of the other offenses. *Brown v. State*, 291 Ga. 750, 733 S.E.2d 300 (2012).

Evidence that the movement, while not necessarily lengthy, was long enough to satisfy the duration element; the movement did not occur during the aggravated battery but rather after the first beating and before a second beating; that the movement was not an inherent part of the beating; and that the movement itself presented a danger to the victim because the victim was moved to a secluded location in the middle of the night was sufficient to support the asportation element of kidnapping. *Williams v. State*, 291 Ga. 501, 732 S.E.2d 47 (2012).

16-5-41. False imprisonment.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

JURY INSTRUCTIONS

General Consideration

Essential difference between kidnapping and false imprisonment, etc.

State's evidence established the element of asportation for kidnapping under O.C.G.A. § 16-5-40(a) by showing that, while the victim willingly entered the defendant's vehicle, the victim demonstrated the desire to escape by jumping from the defendant's vehicle and trying to call 9-1-1 for help. The defendant moved the victim against the victim's will by dragging the victim back into the vehicle and continuing to drive; thus, the defendant's movement of the victim in the vehicle was not a criminally insignificant circumstance attendant to some other crime. *Day v. State*, 317 Ga. App. 243, 730 S.E.2d 734 (2012).

Citizen's arrest not valid defense to offense of false imprisonment. — Trial evidence showed that defendant confined the victim in the bedroom without lawful authority. In light of defendant's testimony that the victim had not been confined at all, trial counsel was not ineffective in failing to pursue jury instructions based on an inconsistent theory that defendant had in fact confined the victim, but was legally authorized to do so. *Smith v. State*, 314 Ga. App. 583, 724 S.E.2d 885 (2012).

Crime creates risk of violent injury. — Georgia cases made clear that false imprisonment in violation of O.C.G.A. § 16-5-41 ordinarily creates risks of physical injury to another similar to the risks of burglary: the risk of a violent confrontation between the offender and the person being falsely imprisoned, including the risk that the offender will have to inflict serious physical injury to detain the victim. And, just as with burglary, the offender's awareness that such a confrontation is possible and could be necessary indicates that the offender may well be prepared to use violence if necessary to complete the crime or to escape. *United States v. Chitwood*, 676 F.3d 971 (11th Cir. 2012), cert. denied, *U.S.* , 133 S. Ct. 288, 184 L. Ed. 2d 169 (2012).

Application

False imprisonment as lesser included offense of kidnapping with bodily injury.

Trial court did not err in allowing the jury to consider the lesser included offense of false imprisonment after granting a directed verdict on the kidnapping charges against defendant because false imprisonment was a lesser included offense of kidnapping, and the indictment against defendant contained all the essential elements related to false imprisonment. *Martinez v. State*, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

Kidnapping and false imprisonment.

Defendant's conviction for false imprisonment did not merge with the offense of kidnapping since the kidnapping occurred when the defendant forced the victim to move to a secluded location and held the victim there against the victim's will. After the defendant raped the victim, the defendant falsely imprisoned the victim on the premises by shoving the victim to the ground and ordering the victim to remain under threat of violence while the defendant escaped. These two events were separate in time and supported by separate facts. Consequently, the acts constituted separate offenses which did not merge. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

False imprisonment occurring during rape.

Evidence was more than sufficient to support the defendant's false imprisonment conviction because the victim testified that after the defendant finished raping her, she felt like she could not leave the house since the defendant had a knife, and the defendant's mental state appeared unstable; one of the responding officers also testified that the victim was visibly traumatized, physically shaking, and crying upon her release from the house. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Evidence sufficient to support conviction.

Jury's verdict convicting a defendant of false imprisonment was supported by ev-

idence that the defendant threatened the victim, a 65-year-old widow, and ordered her to stay on her bed in the nude while the defendant spit on her and cursed her, then ordered her to sit in a filled bathtub where the defendant threatened to drop a hair dryer into the tub with her. *Schneider v. State*, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence was sufficient to support the defendant's conviction for false imprisonment, under O.C.G.A. § 16-5-41(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told the relatives what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the

attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Evidence that the defendant and an accomplice entered a store and the defendant approached two women, pulled out a gun, forced the women and children to the back of the store, and forced them to lie on the floor while the defendant and the accomplice forced an employee to give them money was sufficient to support defendant's robbery and false imprisonment convictions. *Taylor v. State*, 318 Ga. App. 115, 733 S.E.2d 415 (2012).

Evidence that the defendant came into the victim's hotel room uninvited, put a hand across the victim's mouth, and laid on top of the victim, confining the victim's movement and rendering the victim unable to resist was sufficient to support the defendant's conviction for false imprisonment. *Murrell v. State*, 317 Ga. App. 310, 730 S.E.2d 675 (2012).

Sufficient evidence supported the defendant's false imprisonment conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. *Bush v. State*, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during commission of a felony. *Thompson v. State*, 739 S.E.2d 434, No. A12A2000, 2013 Ga. App. LEXIS 141 (2013).

Sufficient factual basis for false imprisonment charge. — Trial court did not abuse the court’s discretion in refusing to allow withdrawal of the defendant’s guilty plea on the ground that the factual basis set forth by the state was insufficient to support the false imprisonment charge, O.C.G.A. § 16-5-41, because the state’s recitation of facts reflecting that the defendant had detained the victim on a bed and inside the defendant’s residence presented a sufficient factual basis for the false imprisonment charge. *James v. State*, 309 Ga. App. 721, 710 S.E.2d 905 (2011).

Jury Instructions

Jury instruction on false imprison-

16-5-44.1. Hijacking a motor vehicle.

JUDICIAL DECISIONS

Evidence sufficient for conviction.

Trial court did not err in denying the defendant’s motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator’s testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator’s testimony about the defendant’s participation in the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Evidence was sufficient to authorize the defendant’s convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant’s involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence pre-

ment should have been given.

Defendant’s conviction for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) was reversed because the trial court erred in failing to charge the jury on the lesser-included offense of false imprisonment, O.C.G.A. § 16-5-41(a); there was some evidence from which the jury could have convicted the defendant on the lesser-included offense, and the evidence of kidnapping was not so overwhelming so as to render the trial court’s failure to give the charge harmless. *Curtis v. State*, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

sented was that: (1) when two people walked past the victim’s parked vehicle, one of the people held a knife to the victim’s stomach and ordered the victim to give the person the victim’s wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver’s seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim’s wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant’s arrest. *Harrelson v. State*, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Sufficient evidence showed the defendant committed a hijacking, under O.C.G.A. § 16-5-44.1(b), because: (1) the statute included attempt as a means of committing the crime; and (2) the defendant’s assertion of ownership of a victim’s vehicle and the fact that the victim was pulled out of the vehicle constituted substantial steps toward committing the crime. *Campbell v. State*, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to convict the defendant of aggravated assault, motor-vehicle hijacking, and possession of a firearm during the commission of a crime, under O.C.G.A. §§ 16-5-21(a)(2), 16-5-44.1(b), and 16-11-106(b)(1), because the defendant waited in a getaway vehicle while an accomplice hijacked the victim's vehicle and possessed the gun that the accomplice used in the crime. *Gordon v. State*, 316 Ga. App. 42, 728 S.E.2d 720 (2012).

As the first defendant aided and abetted in effecting a plan to steal the victim's car, and as the second defendant took the victim's money, the evidence was sufficient to convict both of them of armed robbery, hijacking a motor vehicle, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-8-41(a), 16-5-44.1, 16-11-106. *Copeny v. State*, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

Evidence sufficient for attempt to hijack motor vehicle. — Given that a defendant repeatedly stabbed a victim in

the throat in a parking lot to attempt to force the victim to get inside the victim's car, the trial court could find that the defendant rejected the car keys when the victim offered the keys because the defendant intended to abscond with both the car and the victim as needed to prove attempted hijacking of a motor vehicle under O.C.G.A. §§ 16-4-1 and 16-5-44.1(b). *Hickman v. State*, 311 Ga. App. 544, 716 S.E.2d 597 (2011).

Jury instructions.

Defendant's trial counsel was not ineffective in failing to request a jury charge on hijacking a motor vehicle because under O.C.G.A. § 16-5-44.1(c) hijacking a motor vehicle was punishable by imprisonment for not less than ten nor more than 20 years, the same range as kidnapping. Therefore, the defendant could show no prejudice from the defendant's counsel's failure to request such a charge. *Howard v. State*, 310 Ga. App. 659, 714 S.E.2d 255 (2011).

Cited in *Russell v. State*, 319 Ga. App. 472, 735 S.E.2d 797 (2012).

16-5-45. (For effective date, see note.) Interference with custody.

(a) As used in this Code section, the term:

(1) (For effective date, see note.) "Child" means any individual who is under the age of 17 years or any individual who is under the age of 18 years who is alleged to be a dependent child or a child in need of services as such terms are defined in Code Section 15-11-2.

(2) "Committed person" means any child or other person whose custody is entrusted to another individual by authority of law.

(3) (For effective date, see note.) "Lawful custody" means that custody inherent in the natural parents, that custody awarded by proper authority as provided in Code Section 15-11-133, or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction.

(4) "Service provider" means an entity that is registered with the Department of Human Services pursuant to Article 7 of Chapter 5 of Title 49 or a child welfare agency as defined in Code Section 49-5-12 or an agent or employee acting on behalf of such entity or child welfare agency.

(b)(1) A person commits the offense of interference with custody when without lawful authority to do so, the person:

(A) Knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person;

(B) Knowingly harbors any child or committed person who has absconded; provided, however, that this subparagraph shall not apply to a service provider that notifies the child's parent, guardian, or legal custodian of the child's location and general state of well being as soon as possible but not later than 72 hours after the child's acceptance of services; provided, further, that such notification shall not be required if:

(i) The service provider has reasonable cause to believe that the minor has been abused or neglected and makes a child abuse report pursuant to Code Section 19-7-5;

(ii) The child will not disclose the name of the child's parent, guardian, or legal custodian, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(iii) The child's parent, guardian, or legal custodian cannot be reached, and the Division of Family and Children Services within the Department of Human Services is notified within 72 hours of the child's acceptance of services; or

(C) Intentionally and willfully retains possession within this state of the child or committed person upon the expiration of a lawful period of visitation with the child or committed person.

(2) A person convicted of the offense of interference with custody shall be punished as follows:

(A) Upon conviction of the first offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than \$200.00 nor more than \$500.00 or shall be imprisoned for not less than one month nor more than five months, or both fined and imprisoned;

(B) Upon conviction of the second offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than \$400.00 nor more than \$1,000.00 or shall be imprisoned for not less than three months nor more than 12 months, or both fined and imprisoned; and

(C) Upon the conviction of the third or subsequent offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(c)(1) A person commits the offense of interstate interference with custody when without lawful authority to do so the person knowingly or recklessly takes or entices any minor or committed person away

from the individual who has lawful custody of such minor or committed person and in so doing brings such minor or committed person into this state or removes such minor or committed person from this state.

(2) A person also commits the offense of interstate interference with custody when the person removes a minor or committed person from this state in the lawful exercise of a visitation right and, upon the expiration of the period of lawful visitation, intentionally retains possession of the minor or committed person in another state for the purpose of keeping the minor or committed person away from the individual having lawful custody of the minor or committed person. The offense is deemed to be committed in the county to which the minor or committed person was to have been returned upon expiration of the period of lawful visitation.

(3) A person convicted of the offense of interstate interference with custody shall be guilty of a felony and shall be imprisoned for not less than one year nor more than five years. (Code 1933, § 26-1312, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1978, p. 1420, § 1; Ga. L. 1982, p. 970, § 2; Ga. L. 1986, p. 1325, § 1; Ga. L. 1987, p. 561, § 1; Ga. L. 1999, p. 81, § 16; Ga. L. 2000, p. 20, § 5; Ga. L. 2011, p. 470, § 2/SB 94; Ga. L. 2013, p. 294, § 4-7/HB 242.)

Delayed effective date. — Paragraphs (a)(1) and (a)(3), as set out above, become effective January 1, 2014. For version of paragraphs (a)(1) and (a)(3) in effect until January 1, 2014, see the 2013 amendment note.

The 2013 amendment, effective January 1, 2014, substituted “dependent child or a child in need of services” for “deprived child or an unruly child” in paragraph (a)(1); and substituted “Code Section 15-11-133” for “Code Section 15-11-45” in paragraph (a)(3). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General

Assembly, provides that: “This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

JUDICIAL DECISIONS

Indictment sufficient to withstand general demurrer. — Indictment alleging that the defendant, without lawful authority, did entice a child from the child’s legal custodian, contrary to the laws of Georgia, was sufficient although the indictment did not allege that the defendant “knowingly or recklessly enticed” the child, pursuant to O.C.G.A.

§ 16-5-45(b)(1)(A), because the use of the verb “entice” described an intentional act. *State v. Wilson*, 318 Ga. App. 88, 732 S.E.2d 330 (2012).

Cited in *In re Levin*, 289 Ga. 170, 709 S.E.2d 808 (2011); *Baker v. State*, 316 Ga. App. 122, 728 S.E.2d 767 (2012); *State v. Wilson*, No. A12A1122, 2012 Ga. App. LEXIS 793 (Sept. 25, 2012).

16-5-46. Trafficking of persons for labor or sexual servitude.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, “Crimes and Offenses: Crimes Against the Person,” see 28 Ga. St. U.L. Rev. 131 (2011).

16-5-47. Posting model notice with human trafficking hotline information in businesses and on Internet; termination.

(a) As used in this Code section, the term:

(1) “Adult entertainment establishment” means any place of business or commercial establishment wherein:

(A) The entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation;

(B) The patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments; or

(C) The patron directly or indirectly is charged a fee to engage in personal contact by employees, devices, or equipment, or by personnel provided by the establishment.

Such term shall include, but shall not be limited to, bathhouses, lingerie modeling studios, and related or similar activities. Such term shall not include businesses or commercial establishments which have as their sole purpose the improvement of health and physical fitness through special equipment and facilities, rather than entertainment.

(2) “Agricultural products” means raising, growing, harvesting, or storing of crops; feeding, breeding, or managing livestock, equine, or poultry; producing or storing feed for use in the production of livestock, including, but not limited to, cattle, calves, swine, hogs, goats, sheep, equine, and rabbits, or for use in the production of poultry, including, but not limited to, chickens, hens, ratites, and turkeys; producing plants, trees, Christmas trees, fowl, equine, or animals; or the production of aquacultural, horticultural, viticultural, silvicultural, grass sod, dairy, livestock, poultry, egg, and apiarian products.

(3) “Bar” means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of

those beverages, including, but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.

(4) “Day hauler” means any person who is employed by a farm labor contractor to transport, or who for a fee transports, by motor vehicle, workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person; provided, however, that such term shall not include a person who produces agricultural products.

(5) “Farm labor contractor” means any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons; provided, however, that such term shall not include a person who produces agricultural products.

(6) “Hotel” means any hotel, inn, or other establishment which offers overnight accommodations to the public for hire.

(7) “Massage therapist” means a person licensed pursuant to Chapter 24A of Title 43.

(8) “Primary airport” shall have the same meaning as set forth in 49 U.S.C. Section 47102(16).

(9) “Substantially nude” means dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person’s pubic hair, anus, cleft of the buttocks, vulva, or genitals.

(10) “Truck stop” means a privately owned and operated facility that provides food, fuel, shower or other sanitary facilities, and lawful overnight truck parking.

(b) Effective September 15, 2013, the following businesses and other establishments shall post the notice described in subsection (c) of this Code section, or a substantially similar notice, in English, Spanish, and any other language deemed appropriate by the director of the Georgia Bureau of Investigation, in each public restroom for the business or establishment and either in a conspicuous place near the public entrance of the business or establishment or in another conspicuous location in clear view of the public and employees where similar notices are customarily posted:

- (1) Adult entertainment establishments;
- (2) Bars;
- (3) Primary airports;
- (4) Passenger rail or light rail stations;
- (5) Bus stations;
- (6) Truck stops;
- (7) Emergency rooms within general acute care hospitals;
- (8) Urgent care centers;
- (9) Farm labor contractors and day haulers;
- (10) Privately operated job recruitment centers;
- (11) Safety rest areas located along interstate highways in this state;
- (12) Hotels; and
- (13) Businesses and establishments that offer massage or bodywork services by a person who is not a massage therapist.

(c) On or before August 1, 2013, the Georgia Bureau of Investigation shall develop a model notice that complies with the requirements of this subsection and make the model notice available for download on its Internet website. Such notice shall be at least 8 1/2 inches by 11 inches in size, printed in a 16 point font in English, Spanish, and any other language deemed appropriate by the director of the Georgia Bureau of Investigation, and state the following:

“Are you or someone you know being sold for sex or made/forced to work for little or no pay and cannot leave? Call the National Human Trafficking Resource Center at 1-888-373-7888 for help. All victims of slavery and human trafficking have rights and are protected by international, federal, and state law.

The hotline is:

- (1) Anonymous and confidential;
- (2) Available 24 hours a day, seven days a week;
- (3) Able to provide help, referral to services, training, and general information;
- (4) Accessible in 170 languages;
- (5) Operated by a nonprofit, nongovernmental organization; and
- (6) Toll free.”

(d) A law enforcement officer shall notify, in writing, any business or establishment that has failed to comply with this Code section that it has failed to comply with the requirements of this Code section and if it does not correct the violation within 30 days from the date of receipt of the notice, the owner of such business or establishment shall be charged with a violation of this Code section and upon conviction shall be guilty of the misdemeanor offense of failure to post the National Human Trafficking Resource Center hotline number and may be punished by a fine of not more than \$500.00; but the provisions of Chapter 11 of Title 17 and any other provision of law to the contrary notwithstanding, the costs of such prosecution shall not be taxed nor shall any additional penalty, fee, or surcharge to a fine for such offense be assessed against an owner for conviction thereof. Upon a second or subsequent conviction, the owner shall be guilty of a high and aggravated misdemeanor and shall be punished by a fine not to exceed \$5,000.00. The notice required by this subsection may be hand delivered to the noncomplying business or establishment or mailed to it at the address of such business or establishment.

(e) This Code section shall be repealed in its entirety on January 1, 2019, unless extended by an Act of the General Assembly. (Code 1981, § 16-5-47, enacted by Ga. L. 2013, p. 620, § 1/HB 141.)

Effective date. — This Code section became effective May 6, 2013.

ARTICLE 4

RECKLESS CONDUCT

16-5-60. Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons or hepatitis infected persons.

Cross references. — Child committing delinquent act constituting AIDS transmission crime including testing and

reporting, § 15-11-603. Disclosure of AIDS confidential information, § 24-12-21.

JUDICIAL DECISIONS

Reckless conduct charge not warranted when firing of gun was not negligent. — Defendant's battery conviction under O.C.G.A. § 16-5-23.1(b) was supported by evidence that the defendant struck the victim in the eye with the defendant's hand, causing the eye to swell. A charge on the lesser included offense of reckless conduct under O.C.G.A.

§ 16-5-60(b) was not warranted because there was no evidence that the defendant fired a gun negligently; the only evidence was that the defendant fired several shots at the victim. *Tiller v. State*, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Merger with aggravated battery.

Because a charge under O.C.G.A. § 16-5-24(a) for aggravated battery re-

quired showings of malice and disfigurement, while the charge under O.C.G.A. § 16-5-60(b) for reckless conduct did not require any more proof beyond showing the defendant shot the victim causing bodily harm, the reckless conduct charge should have merged into the aggravated battery charge as a matter of fact. *DeLeon v. State*, 289 Ga. 782, 716 S.E.2d 173 (2011).

Jury instructions.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Defendant was not entitled to a jury charge on the misdemeanors of reckless

conduct, O.C.G.A. § 16-5-60(b), as a lesser included offense of the felony counts of aggravated assault because, although the defendant relied upon evidence that the defendant was intoxicated, the defendant cited no evidence that the defendant's intoxicated state was involuntary or that the intoxication resulted in any permanent brain function alteration. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

Trial court did not commit reversible error in failing to give, sua sponte, a jury charge on justification because there was no evidence to support such a charge; contrary to the defendant's assertions in the defendant's brief, at no time did the defendant testify that the defendant accelerated to 103 mph because the defendant had no safer option. *Jones v. State*, 315 Ga. App. 688, 727 S.E.2d 512 (2012).

Refusal to instruct on reckless conduct. — Trial court did not err when the court refused to charge the jury on simple assault and reckless conduct as lesser included offenses of aggravated assault because the defendant failed to raise a question of fact as to whether the defendant assaulted the victim with a gun and there was no evidence suggesting that the gun went off accidentally. *Johnson v. State*, 739 S.E.2d 469, No. A12A2510, 2013 Ga. App. LEXIS 143 (2013).

ARTICLE 5

CRUELTY TO CHILDREN

16-5-70. Cruelty to children.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- APPLICATION
- MERGER WITH OTHER OFFENSES
- JURY ISSUES AND INSTRUCTIONS

General Consideration

Specifying specific date in indictment not required. — In a child abuse case, trial counsel was not ineffective for failing to file a special demurrer to establish the date of the crime as a material allegation of the indictment because the exact date was not a material allegation of the indictment and the evidence showed that the victim was beaten by the defendant on October 2, 2008, and that the co-defendant beat the victim with belts on other occasions, and other evidence showed that the victim's scars were a year old or less; therefore, the state proved that child cruelty occurred within the statute of limitation. *Moore v. State*, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

Evidence sufficient to support conviction. — Mother's conviction was affirmed because there was evidence from which the jury could infer that the mother was aware of the boyfriend's sexual abuse of her daughters but did not adequately intervene. The evidence was therefore sufficient to support the mother's convictions of cruelty to children in the first degree. *Adorno v. State*, 314 Ga. App. 509, 724 S.E.2d 816 (2012).

Motion to withdraw guilty plea. — Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. *Carson v. State*, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Sentence proper. — Defendant failed to demonstrate that the defendant's sen-

tence of ten years for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), and contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), were unlawful because the trial court found that the defendant's defense was based upon lies and asserted in bad faith; the sentences were within the statutory limits for each of the crimes for which the defendant was convicted pursuant to O.C.G.A. §§ 16-5-70(e)(2) and 16-12-1(b). *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Rule of lenity did not apply. — Rule of lenity did not require that the defendant receive the lesser punishment for the two counts of cruelty to children against the defendant because, although the jury could have found the defendant guilty of the third degree of the offense, based on the violent attack the defendant waged against the adult victim in the child victims' presence, the evidence authorized the jury to find the additional element required for the second degree of the offense, that is, that the defendant's conduct caused the child victims to suffer cruel and excessive mental pain as alleged in the indictment; consequently, the rule of lenity did not require that the defendant be punished only for the third degree of the offense. *White v. State*, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

Cited in *Ellington v. State*, 292 Ga. 109, 735 S.E.2d 736 (2012).

Application

Whipping of child.

Evidence that a six-year-old victim was spending the night at the defendant's house when the defendant became angry because the victim broke a pair of glasses and whipped the victim with a telephone cord, leaving wounds on the victim's back, buttocks, thighs, and groin, was sufficient to support defendant's conviction of first-degree child cruelty in violation of O.C.G.A. § 16-5-70. *Chambers v. State*, 313 Ga. App. 39, 720 S.E.2d 358 (2011).

Murder of mother in front of child.

There was sufficient evidence to support the defendant's conviction for third-degree child cruelty based on the evidence adduced at trial that the defendant beat and stabbed the defendant's spouse in front of

the defendant's children and other witnesses. *Dunn v. State*, 292 Ga. 359, 736 S.E.2d 392 (2013).

Cruel and excessive mental pain.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree because there was more than sufficient evidence from which the jury could infer that the defendant's children had suffered cruel and excessive mental pain as a result of the patently unhealthy, filthy, and dangerous conditions in which the children were forced to live; the state presented overwhelming evidence of the filthy and neglected conditions of the children, the children's significant developmental delays, one child's confinement to a urine and feces-stained crib without a diaper, and the fact that another child was locked in a urine-soiled bedroom without access to a toilet. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Evidence was sufficient to convict the defendant of cruelty to children in the second degree because the jury was authorized to conclude that the presence of an unembalmed corpse in the minor children's home for nearly three days was a criminally negligent act constituting an unsanitary condition and to infer from the reaction of the police officers that the resulting stench caused the children excessive mental pain; neither an incomplete understanding by the children nor an absence of physical symptoms, such as vomiting, would preclude the internal experience of excessive mental pain. *Walden v. State*, 289 Ga. 845, 717 S.E.2d 159 (2011).

Failure to procure medical treatment.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), because after the victim sustained second and third degree burns, the defendant failed to seek immediate treatment for the victim, and the defendant also prevented the victim's mother from taking the victim to the hospital for treatment; during the delay in which appropriate medical treatment was withheld, the victim had difficulty eating and sleeping, became dehydrated, and developed an in-

fection in the area of the burns. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Malnutrition.

Evidence was sufficient to support a father's malice murder conviction and a mother's conviction of felony murder during first-degree child cruelty under O.C.G.A. § 16-5-70(a) since extensive medical testimony showed their baby's need of medical attention and the baby's condition of extreme malnourishment or starvation causing death. *Sanders v. State*, 289 Ga. 655, 715 S.E.2d 124 (2011).

Felony murder conviction upheld.

The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Conviction for felony murder predicated on cruelty to children in the first degree was supported by evidence concerning the severity and scope of the victim's injuries, which permitted an inference that whoever struck the victim, an act to which the defendant admitted, did so maliciously and that the injuries were not the result of reasonable disciplinary measures as alleged by the defendant. *Butler v. State*, 292 Ga. 400, 738 S.E.2d 74 (2013).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), because the evidence authorized a finding that the defendant acted with the requisite criminal negligence under O.C.G.A. §§ 16-2-1(b) and 16-5-70(c) in causing the victim to sustain severe, painful burns to the victim's body; the

state's expert testified that the victim's burns were inconsistent with the defendant's claim that the incident leading to the victim's injuries was merely accidental. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Evidence was sufficient to support the defendant's convictions for aggravated battery, O.C.G.A. § 16-5-24(a), first degree cruelty to children, O.C.G.A. § 16-5-70(b), and second degree cruelty to children, O.C.G.A. § 16-5-70(c), because the victim stated in a forensic interview and testified at trial that the defendant had burned the victim with hot water on more than one occasion and that the defendant had slapped the victim's face and punched the victim in the stomach; the victim was admitted to the hospital with severe burns on the feet, buttocks, and scrotum, and the victim's mother testified that the victim had been under the defendant's care at the time the victim received the burns. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

There was sufficient evidence to support the defendant's conviction for child molestation, aggravated child molestation, and first degree cruelty to children with regard to the defendant's girlfriend's niece based on the testimony of the victim and similar transaction evidence involving the defendant's older daughter. *Royal v. State*, 319 Ga. App. 466, 735 S.E.2d 793 (2012).

Sufficient evidence existed to support the defendant's conviction for cruelty to children because, despite the defendant's contention to the contrary, the evidence was not undisputed that the two-year-old victim was asleep throughout the assault of the child's mother because the mother testified that the two-year-old was shaking just after the mother called 9-1-1, and

O.C.G.A. § 16-5-70(c) does not expressly require that the child victim's cruel or excessive physical or mental pain arise immediately upon the defendant's act of criminal negligence. *White v. State*, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

When the victim described the defendant's abuse to the jury and in a recorded forensic interview that was played for the jury, and the victim included details that the forensic interviewer found inconsistent with someone who had been coached, the victim's testimony and the forensic interview supported the defendant's convictions for aggravated child molestation, child molestation, and first degree cruelty to children. *Worley v. State*, 319 Ga. App. 799, 738 S.E.2d 641 (2013).

Sufficient direct evidence existed to sustain the defendant's conviction for cruelty to children in the first degree based on the testimony of the child victim, who indicated that it was the defendant, not the victim's biological father, who inflicted the injuries; in addition, the victim's biological father was incarcerated out-of-state at the time the injuries were sustained. *Moore v. State*, 319 Ga. App. 766, 738 S.E.2d 348 (2013).

Party to crime of cruelty to children. — Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Defendant eligible to serve ordered term of confinement. — Trial court did not err in denying the defendant's motion to correct an illegal sentence because in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted

felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act, O.C.G.A. § 42-8-65(c), when the legislature enacted the State-Wide Probation Act, O.C.G.A. § 42-8-35.4. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

Child hearsay. — Court of appeals properly held that the children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the court did not err in declining to extend the holding of *Woodard v. State*, 269 Ga. 317 (1998), which was overruled to the defendant's case; the defendant was convicted of first-degree child cruelty for causing cruel mental pain to the victims, yet the defendant made no claim that O.C.G.A. § 16-5-70(b) violated equal protection because the statute did not prohibit the same conduct toward an adult. *Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012) (O.C.G.A. § 24-8-820 eliminated the portion of the 1995 amendment to former § 24-3-16 which was held unconstitutional in *Woodard v. State*).

Merger with Other Offenses

Conviction for cruelty to children merged with felony murder.

Defendant's conviction for cruelty to children had to be vacated because the felony murder of which the defendant was convicted was premised on cruelty to a child; thus, the predicate offense merged into the murder as a matter of law. *Jones v. State*, 292 Ga. 593, No. S12A1759, 2013 Ga. LEXIS 260 (2013).

Cruelty to children and child molestation do not merge. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to chil-

dren, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Rule of lenity did not apply to multiple convictions.

Because attempted murder and aggravated assault were felonies under O.C.G.A. §§ 16-4-6(a), 16-5-21(j), and because first- and third-degree cruelty to children could not be proven by the same evidence under O.C.G.A. § 16-5-70(b), (d)(2), the rule of lenity did not apply; therefore, the trial court properly denied defendant's motion for a new trial. *Rolf v. State*, 314 Ga. App. 596, 724 S.E.2d 881 (2012).

Deprivation of minor conviction did not merge with cruelty to children conviction. — Trial court did not err in failing to merge the defendant's misdemeanor convictions for contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), with the defendant's corresponding felony convictions for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), pursuant to the "required evidence" test, the offenses did not merge as a matter of law; the offenses of cruelty to children in the second degree and contributing to the deprivation of a minor each have at least one essential element that the other does not: causing the child cruel or excessive physical or mental pain and wilfully failing to provide the child with the proper care necessary for his or her health, respectively. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Jury Issues and Instructions

Sufficiency of charge.

Trial counsel was not ineffective for failing to object to the trial court's jury

charge on justifiable parental discipline, O.C.G.A. § 16-3-20(3), because the trial court was authorized to give a justifiable parental discipline jury charge that was adequately adjusted to the evidence in the case; because it was for the jury to decide whether or not the codefendant's conduct caused the victim to suffer cruel or excessive physical pain, any objection to the trial court's jury charge on justifiable parental discipline would have lacked merit. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Failure to charge on accident. — In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming arguendo that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error as the jury's conclusion that the defendant acted with malice,

which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Failure to charge on simple battery.

Trial court did not err in failing to charge the jury on simple battery, O.C.G.A. § 16-5-23, as a lesser included offense of cruelty to a child in the first degree, O.C.G.A. § 16-5-70(b), because the evidence did not authorize such a charge; if the jury believed that an accident occurred, no battery was committed, but if the jury accepted the state's evidence, then the jury was authorized to find that the defendant intentionally assaulted the victim, thereby maliciously causing the victim cruel and excessive physical pain. Furthermore, there was no written request to charge on simple battery in the record. *Elrod v. State*, 316 Ga. App. 491, 729 S.E.2d 593 (2012).

ARTICLE 6

FETICIDE

16-5-80. Feticide; voluntary manslaughter of an unborn child; penalties.

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's

mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. *Platt v. State*, 291 Ga. 631, 732 S.E.2d 75 (2012).

ARTICLE 7

STALKING

16-5-90. Stalking; psychological evaluation.

JUDICIAL DECISIONS

"Surveillance" defined. — Although O.C.G.A. § 16-5-90(a) failed to define the term "surveillance," the term was readily understood by people of ordinary intelli-

gence as meaning a close watch kept over someone or something. Accordingly, the indictment put defendant on notice that driving to, parking at, and sitting outside

the victim's residence constituted "surveillance." *Jones v. State*, 310 Ga. App. 705, 713 S.E.2d 895 (2011).

Evidence insufficient for conviction.

Imposition of a stalking protective order against the former boyfriend was inappropriate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the necessary "pattern" of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing nature, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. *Ramsey v. Middleton*, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Defendant's conviction for aggravated stalking was reversed because the state failed to prove that there was actual contact with the victim, whether through a third party or otherwise, because the purported contact was a letter written by the defendant and given to the victim's attor-

ney at the district attorney's office; thus, there was no evidence that the defendant contacted the victim at a place occupied by the victim. *Seibert v. State*, 739 S.E.2d 91, No. A12A2491, 2013 Ga. App. LEXIS 156 (2013).

Evidence insufficient for protective order.

Trial court abused the court's discretion by issuing a protective order against a lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor's own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. *Martin v. Woodyard*, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

Cited in *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012); *Elgin v. Swann*, 315 Ga. App. 809, 728 S.E.2d 328 (2012); *Edgecomb v. State*, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

16-5-91. Aggravated stalking.

JUDICIAL DECISIONS

Molestation allegations not relevant. — Trial court did not err by excluding the proffered testimony of a witness concerning allegations of abuse by the victim's son against the daughter of the defendant and the victim because the trial court was authorized to conclude that the substantive molestation allegations were not relevant to the aggravated stalking charges against the defendant; the defendant was otherwise allowed to challenge the victim's motives and truthfulness without interjecting immaterial matter at the trial. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Evidence cumulative of defendant's testimony. — Trial court did not err by limiting the testimony of a witness because the defendant did not establish that

the witness's testimony was relevant to the aggravated stalking offenses as charged; the excluded evidence would have been cumulative of the defendant's trial testimony that the defendant was not personally following or watching the victim. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Each text was separate violation. — Convictions for aggravated stalking did not merge as each text the defendant sent to the victim was a separate violation or unit of prosecution. *Nosratifard v. State*, No. A12A2243, 2013 Ga. App. LEXIS 241 (Mar. 20, 2013).

Evidence sufficient for conviction.

As the evidence showed that the defendant was prohibited from contacting a victim due to a protective order, that the

defendant violated that order, and that the defendant's contact was for the purposes of harassing and intimidating the victim, the evidence was sufficient to support the defendant's conviction for aggravated stalking in violation of O.C.G.A. § 16-5-91(a). *Herbert v. State*, 311 Ga. App. 396, 715 S.E.2d 795 (2011).

Jury was authorized to find the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because the victim testified that the defendant had previously threatened the victim, the defendant had a history of violence against the victim, and the defendant made repeated phone calls and sent several text messages to the victim; while the defendant denied at trial that the defendant called the victim, the jury was free to reject that testimony and believe that of the victim, and the defendant did not deny sending text messages to the victim after the defendant's release from jail. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Evidence of harassing texts the defendant sent combined with the defendant's other threatening behavior and the victim's testimony that the victim felt compelled to undertake security measures to feel safe was sufficient to support the defendant's convictions for aggravated stalking. *Nosratifard v. State*, No. A12A2243, 2013 Ga. App. LEXIS 241 (Mar. 20, 2013).

Evidence insufficient for conviction.

Insufficient evidence supported the defendant's aggravated stalking conviction because a divorce court order on which the prosecution relied merely barred the defendant from the home the defendant had shared with the victim, rather than prohibiting the defendant from having contact with the victim, so the order did not "in effect" prohibit the defendant from engaging in conduct that was prohibited by the statute. *Keaton v. State*, 311 Ga. App. 14, 714 S.E.2d 693 (2011).

Defendant's conviction for aggravated stalking was reversed because the state failed to prove that there was actual con-

tact with the victim, whether through a third party or otherwise, because the purported contact was a letter written by the defendant and given to the victim's attorney at the district attorney's office; thus, there was no evidence that the defendant contacted the victim at a place occupied by the victim. *Seibert v. State*, 739 S.E.2d 91, No. A12A2491, 2013 Ga. App. LEXIS 156 (2013).

Motion to sever murder and aggravated stalking denied. — Trial court properly exercised the court's discretion in denying the defendant's motion to sever the count of the indictment charging aggravated stalking from the counts relating to murder because evidence of the stalking offense would be admissible in a separate murder trial; evidence of the defendant's turbulent relationship with the stalking victim and the stalking of that victim was relevant to explain the defendant's animosity for the murder victim and the defendant's motive for the fatal attack. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

Jury instruction on harassing phone calls and violation of temporary protective order not warranted.

— Trial court did not err by failing to give the defendant's requested charges on the lesser included offenses of harassing phone calls and violation of a temporary protective order because the state's evidence was sufficient to establish all of the elements of the aggravated stalking offenses as indicted; under the evidence, either the defendant was guilty of the indicted offenses or the defendant was guilty of no offense whatsoever. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012).

Jury instruction on family violence protective order violation erroneous.

— Defendant's conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. *Edgecomb v. State*, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

16-5-94. Restraining orders; protective orders.

Law reviews. — For comment, “Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability

Through the Equal Protection Clause,” see 60 Emory L.J. 1011 (2011).

JUDICIAL DECISIONS

Protective order upheld.

Trial court did not abuse its discretion in granting applicant a stalking protective order under O.C.G.A. § 16-5-94(d) against a neighbor. The neighbor placed applicant, applicant’s wife, and applicant’s stepchild under surveillance, contacting them for the purpose of harassing and intimidating them over a three-week period by screaming physical threats and taking pictures of applicant’s family from the road while they were on their front porch. The neighbor also swerved her vehicle at the applicant’s stepchild in a manner that forced the stepchild’s vehicle partially off the road. *Elgin v. Swann*, 315 Ga. App. 809, 728 S.E.2d 328 (2012).

Evidence insufficient for protective order.

Imposition of a stalking protective order against the former boyfriend was inappropriate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the necessary “pattern” of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing na-

ture, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. *Ramsey v. Middleton*, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Trial court abused the court’s discretion by issuing a protective order against a lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor’s own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. *Martin v. Woodyard*, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

Jury instruction erroneous. — Defendant’s conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. *Edgecomb v. State*, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

16-5-95. Offense of violating family violence order; penalty.

(a) As used in this Code section, the term:

(1) “Civil family violence order” means any temporary protective order or permanent protective order issued pursuant to Article 1 of Chapter 13 of Title 19.

(2) “Criminal family violence order” means:

(A) Any order of pretrial release issued as a result of an arrest for an act of family violence; or

(B) Any order for probation issued as a result of a conviction or plea of guilty, nolo contendere, or first offender to an act of family violence.

(3) “Family violence” shall have the same meaning as set forth in Code Section 19-13-1.

(b) A person commits the offense of violating a civil family violence order or criminal family violence order when such person knowingly and in a nonviolent manner violates the terms of such order issued against that person, which:

(1) Excludes, evicts, or excludes and evicts the person from a residence or household;

(2) Directs the person to stay away from a residence, workplace, or school;

(3) Restrains the person from approaching within a specified distance of another person; or

(4) Restricts the person from having any contact, direct or indirect, by telephone, pager, facsimile, e-mail, or any other means of communication with another person, except as specified in such order.

(c) Any person convicted of a violation of subsection (b) of this Code section shall be guilty of a misdemeanor.

(d) Nothing contained in this Code section shall prohibit a prosecution for the offense of stalking or aggravated stalking that arose out of the same course of conduct; provided, however, that, for purposes of sentencing, a violation of this Code section shall be merged with a violation of any provision of Code Section 16-5-90 or 16-5-91 that arose out of the same course of conduct. (Code 1981, § 16-5-95, enacted by Ga. L. 2003, p. 652, § 1; Ga. L. 2013, p. 667, § 1/SB 86.)

The 2013 amendment, effective May 6, 2013, added subsection (a); redesignated former subsections (a) through (c) as present subsections (b) through (d), respectively; in subsection (b), rewrote the

introductory paragraph and substituted “such order” for “the order” at the end of paragraph (b)(4); and substituted “subsection (b)” for “subsection (a)” in subsection (c).

JUDICIAL DECISIONS

Jury instruction erroneous. — Defendant’s conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant

was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. *Edgecomb v. State*, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

ARTICLE 8
PROTECTION OF ELDER PERSONS

16-5-100. Definitions.

As used in this article, the term:

(1) “Alzheimer’s disease” means a progressive, degenerative disease or condition that attacks the brain and results in impaired memory, thinking, and behavior.

(2) “Dementia” means:

(A) An irreversible global loss of cognitive function causing evident intellectual impairment which always includes memory loss, without alteration of state of consciousness, as diagnosed by a physician, and is severe enough to interfere with work or social activities, or both, and to require at least intermittent care or supervision; or

(B) The comatose state of an adult resulting from any head injury.

(3) “Disabled adult” means a person 18 years of age or older who is mentally or physically incapacitated or has Alzheimer’s disease or dementia.

(4) “Elder person” means a person 65 years of age or older.

(5) “Essential services” means social, medical, psychiatric, or legal services necessary to safeguard a disabled adult’s, elder person’s, or resident’s rights and resources and to maintain the physical and mental well-being of such person. Such services may include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, and protection from health and safety hazards.

(6) “Exploit” means illegally or improperly using a disabled adult or elder person or that person’s resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one’s own or another person’s profit or advantage.

(7) “Long-term care facility” means any skilled nursing facility, intermediate care home, assisted living community, community living arrangement, or personal care home subject to regulation and licensure by the Department of Community Health.

(8) “Resident” means any person who is receiving treatment or care in any long-term care facility.

(9) “Sexual abuse” means the coercion for the purpose of self-gratification by a guardian or other person supervising the welfare or having immediate charge, control, or custody of a disabled adult, elder person, or resident to engage in any of the following conduct:

(A) Lewd exhibition of the genitals or pubic area of any person;

(B) Flagellation or torture by or upon a person who is unclothed or partially unclothed;

(C) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is unclothed or partially clothed unless physical restraint is medically indicated;

(D) Physical contact in an act of sexual stimulation or gratification with any person’s unclothed genitals, pubic area, or buttocks or with a female’s nude breasts;

(E) Defecation or urination for the purpose of sexual stimulation of the viewer; or

(F) Penetration of the vagina or rectum by any object except when done as part of a recognized medical or nursing procedure. (Code 1981, § 16-5-100, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78.)

Effective date. — This Code section § 1-1/HB 78, effective July 1, 2013, redesignated former Code Section 16-5-100 as became effective July 1, 2013.

Editor’s notes. — Ga. L. 2013, p. 524, present Code Section 16-5-101.

16-5-101. Neglect to a disabled adult, elder person, or resident.

(a) A guardian or other person supervising the welfare of or having immediate charge, control, or custody of a disabled adult, elder person, or resident commits the offense of neglect to a disabled adult, elder person, or resident when the person willfully deprives a disabled adult, elder person, or resident of health care, shelter, or necessary sustenance to the extent that the health or well-being of such person is jeopardized.

(b) The provisions of this Code section shall not apply to a physician nor any person acting under a physician’s direction nor to a hospital, hospice, or long-term care facility, nor any agent or employee thereof who is in good faith acting within the scope of his or her employment or agency or who is acting in good faith in accordance with a living will, a durable power of attorney for health care, an advance directive for health care, an order not to resuscitate, or the instructions of the patient or the patient’s lawful surrogate decision maker, nor shall the provisions of this Code section require any physician, any institution licensed in accordance with Chapter 7 of Title 31, or any employee or

agent thereof to provide essential services or shelter to any person in the absence of another legal obligation to do so.

(c) The provisions of this Code section shall not apply to a guardian or other person supervising the welfare of or having immediate charge, control, or custody of a disabled adult, elder person, or resident who in good faith provides treatment by spiritual means alone through prayer for the person's physical or mental condition, in lieu of medical treatment, in accordance with the practices of and written notarized consent of the person.

(d) A person who commits the offense of neglect to a disabled adult, elder person, or resident of a long-term care facility, upon conviction, shall be punished by imprisonment for not less than one nor more than 20 years, a fine of not more than \$50,000.00, or both. (Code 1981, § 16-5-100, enacted by Ga. L. 2000, p. 1085, § 2; Ga. L. 2002, p. 648, § 1; Ga. L. 2007, p. 133, § 6/HB 24; Code 1981, § 16-5-101, as redesignated by Ga. L. 2013, p. 524, § 1-1/HB 78.)

The 2013 amendment, effective July 1, 2013, redesignated former Code Section 16-5-100 as present Code Section 16-5-101 and rewrote this Code section.

16-5-102. Exploitation and intimidation of disabled adults, elder persons, and residents; obstruction of investigation.

(a) Any person who knowingly and willfully exploits a disabled adult, elder person, or resident, willfully inflicts physical pain, physical injury, sexual abuse, mental anguish, or unreasonable confinement upon a disabled adult, elder person, or resident, or willfully deprives of essential services a disabled adult, elder person, or resident shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than one nor more than 20 years, a fine of not more than \$50,000.00, or both.

(b) Any person who threatens, intimidates, or attempts to intimidate a disabled adult, elder person, or resident who is the subject of a report made pursuant to Chapter 5 of Title 30 or Article 4 of Chapter 8 of Title 31, or any other person cooperating with an investigation conducted pursuant to this Code section, shall be guilty of a misdemeanor of a high and aggravated nature.

(c) Any person who willfully and knowingly obstructs or in any way impedes an investigation conducted pursuant to Chapter 5 of Title 30 or Article 4 of Chapter 8 of Title 31, upon conviction, shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 16-5-102, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78.)

Effective date. — This Code section became effective July 1, 2013.

16-5-103. Exceptions to criminal liability.

An owner, officer, administrator, board member, employee, or agent of a long-term care facility shall not be held criminally liable for the actions of another person who is convicted pursuant to this article unless such owner, officer, administrator, board member, employee, or agent was a knowing and willful party to or conspirator to the abuse or neglect, as defined in Code Section 30-5-3, or exploitation of a disabled adult, elder person, or resident. (Code 1981, § 16-5-103, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78.)

Effective date. — This Code section became effective July 1, 2013.

16-5-104. Applicability.

This article shall be cumulative and supplemental to any other law of this state. (Code 1981, § 16-5-104, enacted by Ga. L. 2013, p. 524, § 1-1/HB 78.)

Effective date. — This Code section became effective July 1, 2013.

CHAPTER 6

SEXUAL OFFENSES

16-6-1. Rape.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- MERGER AND OTHER OFFENSES
- JURY INSTRUCTIONS
- SUFFICIENCY OF EVIDENCE
- SENTENCE

General Consideration

Venue sufficiently established. — Trial court did not err in denying the defendant’s motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a

detective’s testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant’s argument that the evidence only supported the conclusion that the victim could have been driven into an-

other county before the rape occurred, that would not preclude a jury's conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. *Bizimana v. State*, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Denial of defendant's motion for a directed verdict of acquittal, etc.

Defendant's complaint that the trial court erred in denying the defendant's motion for a directed verdict of acquittal as to the offense of forcible rape was rendered moot because the defendant was not found guilty of that offense. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Counsel not ineffective in rape trial. — Defendant was not prejudiced by trial counsel's failure to object to testimony speculating as to the defendant's state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim's belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Cited in *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Merger and Other Offenses

Aggravated assault merged with rape.

Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Jury Instructions

Charge proper. — While the indictment alleged that the defendant had car-

nal knowledge of a child under 16 years of age and the jury charge stated that the defendant could be convicted of rape for having carnal knowledge of a female under 10 years of age, there was no error because the evidence supported a determination that the victim was under 10 and the defendant did not challenge the sufficiency of that evidence. *Brown v. State*, 315 Ga. App. 115, 726 S.E.2d 612 (2012), cert. denied, No. S12C1239, 2012 Ga. LEXIS 983 (Ga. 2012).

Requested charge on penetration given. — Given that the defendant's requested charge on penetration was given, the defendant failed to demonstrate how the trial court's penetration charge, which was an accurate statement of the law, violated the defendant's due process rights. The charge did not instruct the jury that rape could be committed in a manner different than charged in the indictment. *Liger v. State*, 318 Ga. App. 373, 734 S.E.2d 80 (2012).

Sufficiency of Evidence

Evidence of similar prior offense held admissible.

During the defendant's trial for rape, the trial court did not err by permitting the state to present evidence of a prior similar transaction because the prior transaction evidence was proper and not foreclosed by collateral estoppel since identity and commission of the act were not at issue in the first trial; identity was not an issue in the prior case because the defendant claimed that consensual sex, and in the case before the trial court, identity was one of the purposes for which the state sought to have the similar transaction evidence admitted since the defendant claimed that he did not know the victim and had not raped her. *Bell v. State*, 311 Ga. App. 289, 715 S.E.2d 684 (2011).

Sufficient evidence to authorize conviction.

Evidence was sufficient to authorize the jury to find the defendant guilty of statutory rape beyond a reasonable doubt because the defendant befriended the 12-year-old victim, and on various occasions the defendant engaged in sexual contact with the victim; the defendant fondled the victim's breasts and vaginal

area, inserted his finger into her vagina, and inserted his penis into her mouth and vagina. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Evidence was sufficient to show both force and lack of consent because the victim stated that the defendant refused to stop when the victim told the defendant that the victim did not want to have sex with the defendant; the defendant repeatedly had sexual intercourse with the victim, threatening the victim not to tell anyone. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Defendant's conviction for aggravated assault and rape was affirmed because there was no evidence of tampering or contamination and the trial court properly admitted the evidence from the rape kit and the defendant's DNA matched that of the victim's attacker and the similar transaction evidence that the defendant had committed another rape of an exotic dancer was sufficient to support the conviction. *Mickens v. State*, 318 Ga. App. 601, 734 S.E.2d 438 (2012).

Ten-year-old victim's testimony that on one occasion the defendant ordered the victim into the defendant's bed where the defendant had vaginal intercourse with the victim was sufficient to support the defendant's rape conviction. The jury could have inferred that the victim did not willingly consent but was intimidated into complying with the defendant's demands out of fear of punishment. *Smith v. State*, 319 Ga. App. 590, 737 S.E.2d 700 (2013).

Victim's testimony alone sufficient.

In accord with *Smith v. State*. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Evidence was sufficient to convict the defendant of rape in violation of O.C.G.A. § 16-6-1 because, without anything more, the victim's testimony was enough to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed rape; the victim testified at trial and stated that the defendant entered the victim's bedroom, held down the victim's hands as the victim tried to push the defendant away, and had sexual intercourse with the victim as the victim screamed. *Roberts v. State*, 313 Ga. App. 849, 723 S.E.2d 73 (2012).

Minor victim's testimony that the sexual intercourse hurt and that the victim did not consent and was afraid of the defendant provided the evidence of force necessary to support the defendant's rape convictions. *Brown v. State*, 319 Ga. App. 680, 738 S.E.2d 132 (2013).

Evidence sufficient to support conviction.

Evidence overwhelmingly supported the defendant's conviction for forcible rape in violation of O.C.G.A. § 16-6-1(a)(1) because the state introduced the victim's testimony, the testimony of eyewitnesses to the act, the examining physician's testimony, and the photographic evidence. *Strozier v. State*, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which was both direct evidence of the victims' own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. *Williamson v. State*, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

State of Georgia presented sufficient evidence of forcible rape when: (1) the minor victim testified that the defendant engaged in intercourse with the victim in various positions, that it hurt, and that the victim did not consent; (2) a sexual assault nurse examiner (SANE) testified as to the victim's disclosure that it stung when the defendant put the defendant's penis in the victim's vagina and that it bled on one occasion; and (3) the SANE testified regarding (and the jury viewed photographic evidence of) a laceration to the victim's posterior fourchette, which the SANE testified was consistent with sexual intercourse as alleged by the victim. *Jordan v. State*, 317 Ga. App. 160, 730 S.E.2d 723 (2012).

Evidence which included DNA evidence,

the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. *Glaze v. State*, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Evidence sufficient for conviction of attempted rape.

Evidence was sufficient to support the defendant's conviction for attempted rape in violation of O.C.G.A. §§ 16-4-1 and 16-6-1(a)(1) because the victim's testimony as to the defendant forcing his penis into her vagina against her will sufficed to sustain the attempted rape conviction.

Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Sentence

Sentence authorized when defendant not allowed to withdraw guilty plea. — With regard to the defendant's convictions and sentences for rape, taking a motor vehicle, burglary, aggravated assault, and robbery, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the defendant's guilty plea because when entering the plea the defendant knew that the state was seeking a life sentence, and the sentences were not void since the sentences did not exceed those authorized by law. *Andrews v. State*, 739 S.E.2d 445, No. A12A1874, 2013 Ga. App. LEXIS 142 (2013).

16-6-2. Sodomy; aggravated sodomy; medical expenses.

JUDICIAL DECISIONS

ANALYSIS

**GENERAL CONSIDERATION
AGGRAVATED SODOMY**

General Consideration

Solicitation of sodomy.

Victim's testimony was sufficient to sustain the defendant's conviction for solicitation of sodomy in violation of O.C.G.A. § 16-6-15(a) because the victim testified that the defendant offered to give the victim money for oral sex. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Indictment sufficient.

Defendant was properly convicted of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c) because there was no fatal variance between the allegations and the proof at trial; the indictment was sufficient to put the defendant on notice that the defendant could be convicted for an act of oral sodomy involving the victim's mouth and the defendant's sex organ; the allegation that the defendant did perform an immoral and indecent act of sodomy to a child did not necessarily require that the act involve the defendant's

mouth and the victim's sexual organ. *Weeks v. State*, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

Cited in *Cosmo v. State*, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

Aggravated Sodomy

Prior similar transactions evidence admissible.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom

the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery,

O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which, was both direct evidence of the victims own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. *Williamson v. State*, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

There was sufficient evidence to support the defendant's conviction for aggravated sodomy because the victim testified that while holding a knife, and after having vaginal intercourse with the victim against her will, the defendant put his penis into her mouth to ejaculate; pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone was sufficient to support a finding of guilt beyond a reasonable doubt. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

16-6-3. Statutory rape.

Cross references. — Testimony as to child's description of sexual contact or physical abuse, § 24-8-820.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EVIDENCE

MERGER WITH OTHER OFFENSES

JURY ISSUES AND INSTRUCTIONS

General Consideration

Denial of first offender status was affirmed. — Defendant's sentence for statutory rape was affirmed because the "any portion thereof" language in O.C.G.A. § 17-10-6.2(c)(1) indicated that the legislature's intent was not to allow the trial court to deviate from the entirety of § 17-10-6.2(b), but rather to grant the trial court discretion to deviate only from the mandatory minimum sentence guide-

lines. *Tew v. State*, 320 Ga. App. 127, 739 S.E.2d 423 (2013).

Cited in *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Evidence

Corroborating evidence.

There was sufficient corroboration of a victim's testimony for a jury to find the defendant guilty beyond a reasonable doubt of statutory rape, O.C.G.A. § 16-6-3(a), because one of the victim's

sisters testified about the victim's statements to the sister and about the sister's observation of the victim and the defendant going into a bedroom together during the relevant time period; the victim's great aunt testified that when the victim told the aunt about the sexual abuse, the victim specifically said that the defendant was having sex with the victim. *Williamson v. State*, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which was both direct evidence of the victims' own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. *Williamson v. State*, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Evidence was sufficient to find defendant guilty of statutory rape and child molestation under O.C.G.A. §§ 16-6-3(a) and 16-6-4(a)(1) because the minor victim's testimony was corroborated by the medical evidence, defendant's opportunity to commit the alleged crimes, defendant's statements during a phone call, and defendant's admission to one incident of sexual intercourse. *Sanchez v. State*, 316 Ga. App. 40, 728 S.E.2d 718 (2012).

Corroborative evidence tending to prove guilt of accused.

Defendant's conviction for statutory rape was affirmed because the victim's prior consistent statements, as recounted by third parties to whom such statements were made, constituted sufficient substantive evidence of corroboration and the cousin and boyfriend provided circumstantial evidence as to defendant's access to and contact with the victim. *Brown v. State*, 318 Ga. App. 334, 733 S.E.2d 863 (2012).

Corroboration and sufficiency of evidence.

Evidence was sufficient to support defendant's conviction for statutory rape because (1) the underage victim met defendant on the Internet and asked defendant to come to Florida to pick the victim up, which defendant did; (2) defendant and the victim returned to defendant's home in Georgia and engaged in sexual intercourse; (3) the victim got homesick and returned home; (4) the victim again asked defendant to come get the victim, which defendant did; (5) the couple returned to defendant's home in Georgia and again had sexual intercourse; and (6) when the couple got into an argument that escalated into a struggle, the victim called the police, who responded to the call. *Baker v. State*, 316 Ga. App. 122, 728 S.E.2d 767 (2012).

Merger with Other Offenses

Consecutive sentences affirmed. — Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant's guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial court's discretion. *Osborne v. State*, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Merger properly denied. — Trial court did not err in denying the defendant's request to merge the defendant's convictions for statutory rape and fornication for the purpose of sentencing because the defendant waived the issue of whether the offenses should have been merged when the defendant knowingly and voluntarily pled guilty to each of the crimes. *Osborne v. State*, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

Jury Issues and Instructions

Erroneous charge.

Defendant's conviction for statutory rape was reversed because the trial court committed plain error by giving an erro-

neous jury charge, which affected the defendant's substantial right to a charge that provided the jury with the proper guideline for determining the defendant's

guilt or innocence, and the court failed to remedy the error. *Agan v. State*, 319 Ga. App. 560, 737 S.E.2d 347 (2013).

16-6-4. Child molestation; aggravated child molestation.

Cross references. — Testimony as to child's description of sexual contact or physical abuse, § 24-8-820.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- APPLICATION
- EXPERT TESTIMONY
- MERGING WITH OTHER OFFENSES
- JURY ISSUES AND INSTRUCTIONS

General Consideration

Voluntary waiver of right to remain silent. — Defendant's convictions were affirmed because the defendant was aware that the defendant was being questioned with regard to the victim's allegations of molestation; understood that the allegations were serious; was not under the influence of drugs or alcohol; and was advised of the defendant's Miranda rights, waived those rights, and signed a form confirming the waiver. *Pendleton v. State*, 317 Ga. App. 396, 731 S.E.2d 75 (2012).

Inference of intent. Defendant's conviction of child molestation was affirmed because the jury was entitled to infer from the direct and circumstantial evidence that the defendant acted with the intent to arouse or satisfy the defendant's own sexual desires. *Parrott v. State*, 318 Ga. App. 545, 736 S.E.2d 436 (2012).

Indictment was not flawed for charging several ways of committing the crime. — Child molestation defendant's behavior in the indictments occurred during the time alleged in the indictments, and the evidence, including testimony from the victims, was sufficient to show that the defendant committed child molestation in at least one of the ways alleged in the indictments. Therefore, even though the indictment used the conjunctive rather than the disjunctive

form, the indictment was sufficient. *Cain v. State*, 310 Ga. App. 442, 714 S.E.2d 65 (2011).

Fatal variance in indictment and conviction. — While the victim's testimony that the defendant engaged the victim in sexual activity and inserted the defendant's penis into the victim's anus was sufficient to prove aggravated child molestation, the defendant was entitled to reversal of that conviction because there was a reasonable possibility that the jury convicted the defendant of that crime in a manner not alleged in the indictment. The indictment alleged that the defendant committed the crime by engaging in sodomy, the evidence at trial included both evidence of sodomy and evidence that the victim was physically injured as a result of sexual intercourse with the defendant, which could also support such a conviction, and the jury was not instructed to limit the jury's consideration to the commission of the crime as alleged in the indictment. *Smith v. State*, 319 Ga. App. 590, 737 S.E.2d 700 (2013).

Venue.

Trial court did not err in denying the defendant's motion for directed verdict because the testimony, taken as a whole, was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the child molestation was committed in Fayette County; during trial and

the victim's forensic interview, the victim described that the molestation incident occurred during a visit to the victim's aunt's residence, which was located in Fayette County, Georgia, and two detectives testified that the referenced visit and molestation incident took place at a residence in Fayette County. *Hargrave v. State*, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Defense counsel not ineffective.

Any attempt by trial counsel to file a demurrer to the count of an indictment charging the defendant with child molestation, O.C.G.A. § 16-6-4(a)(1), would have been futile because nothing in the child molestation statute specifically prohibited the state from prosecuting the defendant on the ground that the defendant engaged in sexual intercourse with the victim; while sexual intercourse is not an element of child molestation, an adult's act of sexual intercourse with a child falls within the parameters of the child molestation statute. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Double Jeopardy did not bar retrial. — Double Jeopardy Clause, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not bar retrial of a defendant as the evidence supported the defendant's conviction under O.C.G.A. § 16-6-4(a) when: (1) the victim told the victim's sister that the defendant had gotten on top of the victim; (2) the sister told the mother, and the victim laid on the bed and moved up and down to show the mother what the defendant did to the victim; (3) the mother told an acquaintance, who reported the incident to an officer; (4) the officer reported the incident to the officer's supervisor, and also spoke with the mother; and (5) the victim told the forensic investigator that the defendant took his clothes off, got on top of the victim as the victim was fully clothed, moved his body up and down, and rubbed his penis against the victim's buttocks. *Wadley v. State*, 317 Ga. App. 333, 730 S.E.2d 536 (2012).

Severance of offenses.

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the offenses involving two child molestation victims because although the charged offenses involved dif-

ferent victims and occurred on different dates, the actions showed the defendant's common motive, lustful disposition, and bent of mind to satisfy the defendant's sexual desires; the defendant gained access to the second victim through a familial relationship with the first victim, and the molestation of the first victim came to light during the investigation of the molestation of the second victim. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Severance of four counts of child molestation and enticing a child, O.C.G.A. §§ 16-6-4(a)(1) and 16-6-5, was not required because the evidence regarding the events was not confusing or complicated, and each of the incidents would have been admissible as a similar crime in a trial of the other incidents. *Heck v. State*, 313 Ga. App. 571, 722 S.E.2d 166 (2012).

Ex post facto violation in sentencing. — Trial court erred in imposing life sentences as to two counts of aggravated sexual molestation because those sentences were ex post facto in application; the defendant was sentenced under a later version of the statute, O.C.G.A. § 16-6-4(d)(1), than the one in effect when the crimes were committed. *Ewell v. State*, 318 Ga. App. 812, 734 S.E.2d 792 (2012).

Sufficiency of the evidence. — Evidence was sufficient to find defendant guilty of statutory rape and child molestation under O.C.G.A. §§ 16-6-3(a) and 16-6-4(a)(1) because the minor victim's testimony was corroborated by the medical evidence, defendant's opportunity to commit the alleged crimes, defendant's statements during a phone call, and defendant's admission to one incident of sexual intercourse. *Sanchez v. State*, 316 Ga. App. 40, 728 S.E.2d 718 (2012).

Defendant's claim that the state failed to prove the offense because the victim was asleep during the entire incident lacked merit, because the child's actual sight of the sexual organs was not required for a child molestation conviction. *Clemens v. State*, 318 Ga. App. 16, 733 S.E.2d 67 (2012).

Cited in *Marshall v. Browning*, 310 Ga. App. 64, 712 S.E.2d 71 (2011); *Bolton v. State*, 310 Ga. App. 801, 714 S.E.2d 377 (2011); *Kaylor v. State*, 312 Ga. App. 633,

719 S.E.2d 530 (2011); *Cosmo v. State*, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

Application

Victim's testimony alone is sufficient to sustain conviction under O.C.G.A. § 16-6-4.

Victim's testimony that when she was 14 years old, the defendant, her step-father, entered her bedroom, laid on top of her, rubbed her breasts, and kissed her on the mouth, neck, and breasts was sufficient to support a jury verdict that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a). *Damerow v. State*, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Evidence from a child molestation victim was sufficient to convict a defendant of five counts of child molestation in violation of O.C.G.A. § 16-6-4. The trial court properly admitted evidence that the defendant had asked the victim's sister to sleep with the defendant on a couch, and properly denied evidence that the victim had made an accusation of sexual misconduct against the victim's grandfather. *Mauldin v. State*, 313 Ga. App. 228, 721 S.E.2d 182 (2011).

Defendant's challenge to the sufficiency of the evidence, based solely on the argument that the victim's testimony was unbelievable, failed because the victim's testimony alone was sufficient to establish the elements of child molestation. *Medrano v. State*, 315 Ga. App. 880, 729 S.E.2d 37 (2012).

There was sufficient evidence to support defendant's convictions for child molestation and enticing a child for indecent purposes based on the testimony of the victim, who stated that when she was 10-years-old, she encountered defendant, who grabbed her arms, forcefully moved her from the stairwell into an empty apartment, and forced her to have vaginal intercourse with him. *Rollins v. State*, 318 Ga. App. 311, 733 S.E.2d 841 (2012).

There was sufficient evidence to support the defendant's conviction for child molestation, aggravated child molestation, and first degree cruelty to children with regard to the defendant's girlfriend's niece based on the testimony of the victim and

similar transaction evidence involving the defendant's older daughter. *Royal v. State*, 319 Ga. App. 466, 735 S.E.2d 793 (2012).

Victims' testimony that the defendant pulled down the victim's pants, reached into the victim's underwear, fondled the victim's genitals, and touched them with the defendant's penis was sufficient to support the defendant's convictions for sexual battery and child molestation. *Reid v. State*, 319 Ga. App. 782, 738 S.E.2d 624 (2013).

Recanting of child victim's testimony.

Evidence was sufficient to sustain the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, § 16-6-4(c), because although the victim recanted prior statements concerning the defendant's acts of sodomy, the recantation did not preclude a conviction since the victim's prior inconsistent statements concerning the defendant's acts of sodomy were allowed to serve as substantive evidence of the defendant's guilt. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Admissibility of evidence of similar or connected offenses against children.

During the defendant's trial for aggravated child molestation and child molestation, the trial court did not abuse the court's discretion in admitting the similar transaction evidence regarding the defendant's prior aggravated molestation of another young boy because the evidence of the defendant's prior aggravated child molestation was appropriate for showing the defendant's lustful disposition toward molesting young boys; the state indicated that the state wished to introduce the similar transaction evidence for all appropriate purposes: identity, plan, motive, bent of mind, and course of conduct. *Jackson v. State*, 309 Ga. App. 450, 710 S.E.2d 649 (2011).

Testimony of a defendant's adult step-daughter regarding the defendant's molestation of her when she was a child was admissible as a similar transaction in the defendant's trial for molestation of his two granddaughters because both the present case and the similar transaction involved defendant molesting underage family

members who were in his home. *Downer v. State*, 310 Ga. App. 136, 712 S.E.2d 571 (2011).

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Because the defendant's prior convictions under O.C.G.A. § 16-12-100.2(d)(1) and (e)(1) and the defendant's indictment for aggravated sexual battery, aggravated child molestation, and child molestation alleged crimes that were sexual in nature with minors and involved a lustful disposition, the independent offenses were admissible under Ga. Unif. Super. Ct. R. 31.3(B). *Butler v. State*, 311 Ga. App. 873, 717 S.E.2d 649 (2011).

Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. *Ledford v. State*, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Evidence of similar or connected sexual offenses against adults.

Trial court did not abuse the court's discretion in admitting the defendant's prior sexual battery conviction during the defendant's trial for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the prior sexual battery and the molestation of the victim were similar; the defendant pled guilty to the sexual battery, establishing that the defendant had committed the separate offense, and both the prior sexual battery and the molestation involved the defendant's acts of touching the female victims' breasts and occurred within a three-month time frame. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

No Crawford violation.

Trial court properly denied defendant's motion for a new trial and upheld his conviction for child molestation because even if the trial court erred by admitting the child victim's recorded interview and her statements to the police investigator, the forensic interviewer, her mother, and a relative, any such error was harmless beyond a reasonable doubt because the evidence against defendant was so overwhelming and cumulative in the nature of the testimony of the emergency room physician, defendant's written statement and recorded confession, and his admissions to others; plus, the child victim's recantations were also admitted into evidence. *Welch v. State*, 318 Ga. App. 202, 733 S.E.2d 482 (2012).

Spouse guilty of aiding and abetting in child molestation. — Evidence was sufficient to support defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), and of child molestation. Evidence was presented that: (1) when defendant's spouse brought the victim back to their home, the spouse left the victim with defendant who admitted to giving the victim thong panties; (2) defendant gave the victim alcohol, and gave the victim pornographic materials to read before defendant's spouse came home; and (3) defendant was close by on the couch when

defendant's spouse pulled down the victim's pants, tried to kiss the victim, pulled down the victim's underwear, and offered the victim money to put on the thong. *Dockery v. State*, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Evidence was sufficient for the jury to find a defendant guilty of child molestation, etc.

Testimony of one of the defendant's granddaughters to the effect that the defendant touched her genital area with his hand and pulled her hand to touch his penis and the other victim's testimony that the defendant touched her genital area was sufficient to support the verdict of guilty on three child molestation charges in violation of O.C.G.A. § 16-6-4(a). *Downer v. State*, 310 Ga. App. 136, 712 S.E.2d 571 (2011).

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. *Hargrave v. State*, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Evidence was sufficient to authorize the finder of fact to find that the defendant acted with the intent to arouse or satisfy the defendant's own or the victim's sexual desires because the defendant touched the victim inappropriately; the testimony of the victim was corroborated by the victim's young cousins, who witnessed the incident, and the victim gave consistent accounts of the incident to police officers, the forensic interviewer, and the victim's aunt's boyfriend. *Reyes-Vera v. State*, 313 Ga. App. 467, 722 S.E.2d 95 (2011).

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sod-

omy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the evidence not only included the victims' testimony, which was both direct evidence of the victims' own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. *Williamson v. State*, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Defendant's conviction for child molestation in violation of O.C.G.A. § 16-6-4(a)(1) could be supported by evidence that the defendant removed the victim's underwear or that the defendant exposed his penis because, in either event, the evidence was sufficient to sustain his conviction. *Lipscomb v. State*, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Defendant's challenge to the sufficiency of the evidence to support the defendant's aggravated child molestation conviction failed because the victim's testimony, standing alone, was sufficient to support the verdict, and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820). *Anderson v. State*, 315 Ga. App. 679, 727 S.E.2d 504 (2012).

Evidence was sufficient to support the defendant's conviction for aggravated child molestation, in violation of O.C.G.A. § 16-6-4(c), because the minor victim testified that the defendant performed oral sex on the victim and made the victim perform oral sex upon the defendant, which was corroborated by the testimony of a sexual assault nurse examiner that the victim disclosed that the defendant put the defendant's penis in the victim's mouth and that the victim described the look and taste of semen. *Jordan v. State*, 317 Ga. App. 160, 730 S.E.2d 723 (2012).

When the victim described the defendant's abuse to the jury and in a recorded forensic interview that was played for the jury, and the victim included details that the forensic interviewer found inconsistent with someone who had been coached, the victim's testimony and the forensic

interview supported the defendant's convictions for aggravated child molestation, child molestation, and first degree cruelty to children. *Worley v. State*, 319 Ga. App. 799, 738 S.E.2d 641 (2013).

Physical evidence of the trauma to at least one victim, together with the consistency of the victims' statements to the outcry witnesses, law enforcement, and the forensic interviewer, the similar transaction testimony, and the evidence showing opportunity, sufficed to establish each element of the charges of aggravated sexual battery and child molestation. *Tudor v. State*, No. A12A1676, 2013 Ga. App. LEXIS 226 (Mar. 19, 2013).

Sufficient evidence supported the defendant's conviction for child molestation based on the testimony of the 19-year-old victim, defendant's daughter, that the defendant entered the victim's bedroom and touched the victim's vagina as well as evidence that the defendant committed similar acts upon two stepdaughters. *Riddick v. State*, No. A12A2133, 2013 Ga. App. LEXIS 220 (Mar. 19, 2013).

Evidence of child molestation.

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. *Obeginski v. State*, 313 Ga. App. 567, 722 S.E.2d 162 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. 2012).

Exposure to child constitutes child molestation.

Jury could determine that the defendant's genitalia was exposed to the victim, which was sufficient evidence of child molestation, because the victim described the defendant's penis in the forensic interview. *Lipscomb v. State*, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Underwear on backwards as evidence of molestation. — Jury could infer that the victim's underwear had been removed by the defendant and hurriedly replaced, which was sufficient evidence of child molestation, because the victim's parents testified that before the parents left to run a quick errand, the victim's underwear was on properly, but it was on improperly when the parents returned; in a forensic interview, the victim explained to the interviewer that the defendant removed the victim's underwear and then replaced the underwear. *Lipscomb v. State*, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Evidence sufficient for conviction.
Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Jury was presented with sufficient evidence to find the defendant guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1) because the testimony of the defendant's former wife regarding what she observed on the night in question, i.e., that the defendant and the victim were asleep together with their underwear pulled down and that she saw what appeared to be fecal matter smeared on the victim's buttocks and the bed sheets, was sufficient for the jury to conclude that the victim's and the defendant's otherwise inexplicable mutual exposure was for the purpose of satisfying the defendant's own sexual desires. *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Evidence was sufficient to enable a jury to find that the defendant acted with the intent to arouse or satisfy the defendant's own or the victim's sexual desires and that the defendant was guilty beyond a reasonable doubt of child molestation because there was significant inferential evidence of the defendant's intent to arouse the

defendant's sexual desires or the sexual desires of the victim. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Evidence insufficient for conviction. — Evidence was insufficient to sustain all four of the defendant's convictions for aggravated child molestation, because a jury reasonably could have inferred that the "bad things" the victim testified the defendant did two or three times a month during the time the victims lived in Oconee County involved defendant's routine and, therefore, defendant performing oral sex on the victim. *Bibb v. State*, 315 Ga. App. 49, 726 S.E.2d 534 (2012).

No fatal variance.

Defendant was properly convicted of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c) because there was no fatal variance between the allegations and the proof at trial; the indictment was sufficient to put the defendant on notice that the defendant could be convicted for an act of oral sodomy involving the victim's mouth and the defendant's sex organ; the allegation that the defendant did perform an immoral and indecent act of sodomy to a child did not necessarily require that the act involve the defendant's mouth and the victim's sexual organ. *Weeks v. State*, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

Claim that there was a fatal variance between the aggravated child molestation allegations in the indictment and the evidence presented at trial lacked merit because the indictment sufficiently apprised the defendant of the charges, did not mislead the defendant as to the criminal action with which the defendant was charged, and the victim's reference to the victim's "lower private area" was sufficient to allow the jury to infer that the victim was referring to the victim's vagina, the body part which the indictment alleged that the defendant touched. *Hernandez v. State*, 319 Ga. App. 876, 738 S.E.2d 701 (2013).

Directed verdict of acquittal unwarranted, etc.

When the defendant was charged with using the Internet to seduce, solicit, lure, or entice a child or a person believed to be a child to commit an illegal sex act, under O.C.G.A. § 16-12-100.2(d)(1), attempted

aggravated child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(c), and attempted child molestation, under §§ 16-4-1 and 16-6-4(a), it was not error to deny the defendant's motion for a directed verdict of acquittal, based on entrapment, because the jury's determination that entrapment did not occur was supported by evidence that: (1) the defendant continued communicating with a person the defendant believed to be 14 years old, including having sexually explicit conversations with the person in which the defendant stated the defendant wanted "a lot of oral," after the defendant learned that the person was 14 years old; (2) the defendant discussed with the person how the person could meet the defendant if the person could not drive, inquired whether the person had ever snuck away from home before, and stated that the defendant believed the union would be legal if the defendant were 16 years old, instead of the defendant's actual age; (3) the defendant left the defendant's home of Tennessee to meet a purportedly 14-year-old girl in order to have sex with the person, which the defendant admitted in the defendant's statements to officers; and (4) the defendant brought condoms with the defendant, which the defendant stated were to prevent any "accidents" in the event the defendant was able to have sex with the person. *Millsaps v. State*, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

Admission of challenged evidence deemed harmless error.

Court of appeals properly held that children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the court did not err in declining to extend the holding of *Woodard v. State*, 269 Ga. 317 (1998), which was overruled as to the defendant's case; there is nothing irrational about creating disparate classes of criminal defendants based on the young age of the witnesses to their crimes. *Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012) (O.C.G.A. § 24-8-820 eliminated the portion of the 1995 amendment to former § 24-3-16 which was held unconstitutional in *Woodard v. State*).

Indictment contained inadequate information as to alleged victim. —

Trial court did not err in granting the defendant's special demurrer and dismissing the indictment charging the defendant with attempted child molestation, O.C.G.A. §§ 16-4-1 and 16-6-4, attempted aggravated child molestation, O.C.G.A. §§ 16-4-1 and 16-6-4(c), and computer pornography, O.C.G.A. § 16-12-100.2(d) because the indictment contained inadequate information as to the alleged victim; attempted child molestation, attempted aggravated child molestation, and computer pornography are crimes against a particular person and require the victim to be identified in the indictment, even where the victim was a police officer using a pseudonym. *State v. Grube*, 315 Ga. App. 885, 729 S.E.2d 42 (2012).

Expert Testimony

Expert testimony regarding child sexual abuse accommodation syndrome, etc.

With regard to the defendant's conviction for child molestation and aggravated sexual battery, the trial court did not err by denying the motion for mistrial or motion for new trial based on the testimony of a forensic interviewer following the child victim's outcry in court about testifying because the forensic interviewer provided only general testimony concerning child abuse accommodation syndrome and the behaviors abused children often exhibit as a result of having been abused and did not testify that in the interviewer's opinion the victim had been abused or that the victim's inability to take the stand to testify against the defendant was a result of having been abused by the defendant. *Canty v. State*, 318 Ga. App. 13, 733 S.E.2d 64 (2012).

Merging With Other Offenses

Charge of two crimes for same described act.

Charges of aggravated sexual battery and child molestation, O.C.G.A. §§ 16-6-22.2(b) and 16-6-4, respectively, were indistinguishable because all of the averments including the date, the victim, and the description of the defendant's conduct constituting the offense were identi-

cal. The charges should have merged for sentencing. *Hudson v. State*, 309 Ga. App. 580, 711 S.E.2d 95 (2011).

Child molestation and sexual battery.

Trial court erred by resentencing the defendant to a more severe sentence on remand following the merging of the defendant's convictions for aggravated sexual battery and child molestation because under the count-by-count approach, the probationary period of the defendant's sentence was less, but the defendant's prison sentence was increased by 15 years. *Hudson v. State*, 318 Ga. App. 54, 733 S.E.2d 360 (2012).

Child molestation and aggravated sexual battery.

Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. *Gaston v. State*, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

Lesser offense of cruelty to children, etc.

Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the

child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Jury Issues and Instructions

Charge to jury.

Defendant was entitled to a new trial because there was a reasonable possibility that the jury convicted the defendant of child molestation, O.C.G.A. § 16-6-4(a), in a manner not charged in the indictment since the trial court did not give a limiting instruction to ensure that the jury would find the defendant guilty in the specific manner charged in the indictment or instruct the jury not to consider child molestation as having occurred in another manner; when the jury expressed the jury's confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit the jury's consideration to determining whether the defendant was guilty of committing child

molestation in the specific manner alleged in the indictment only. *Smith v. State*, 310 Ga. App. 418, 714 S.E.2d 51 (2011), cert. denied, 2012 Ga. LEXIS 249 (Ga. 2012).

Instruction on lesser included offenses.

Defendant was not entitled to a jury instruction on the lesser included offense of sodomy because there was no evidence to warrant such a charge given the defendant's theory of the case, that defendant, who admittedly spent time alone with the victims, had not touched any of the victims, and the state's evidence that the defendant sodomized the victims with the intent to gratify the defendant's own sexual desires. *Ewell v. State*, 318 Ga. App. 812, 734 S.E.2d 792 (2012).

Jury charge upheld.

Because the elements of child molestation were properly limited to those charged in the indictment, the trial court committed no error in the court's charge to the jury on the definition of child molestation. *Weeks v. State*, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

16-6-5. Enticing a child for indecent purposes.

JUDICIAL DECISIONS

Relationship to other law — In that defendant's prior conviction under O.C.G.A. § 16-6-5 was founded upon defendant's discussions of illicit sexual acts with a minor, such actions necessarily related to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor" under 18 U.S.C. § 2252A(b)(1) for purposes of sentence enhancement. *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012).

Sufficiency of indictment.

Defendant failed to show that trial counsel's performance was deficient for not filing a demurrer to the count of the indictment charging the defendant with enticing a child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) because the indictment alleged that the defendant enticed the victim to a place and penetrated the victim's vagina with the defendant's penis. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Evidence of similar prior incident admissible.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Spouse guilty of aiding and abet-

ting in enticing a child for indecent purposes. — Evidence was sufficient to support the defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), and of child molestation. Evidence was presented that: (1) when the defendant's spouse brought the victim back to their home, the spouse left the victim with the defendant who admitted to giving the victim thong panties; (2) the defendant gave the victim alcohol, and gave the victim pornographic materials to read before the defendant's spouse came home; and (3) the defendant was close by on the couch when the defendant's spouse pulled down the victim's pants, tried to kiss the victim, pulled down the victim's underwear, and offered the victim money to put on the thong. *Dockery v. State*, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Using an online chat service, a defendant befriended a White County sheriff's investigator whom the defendant believed to be a 14-year-old girl who said she was a virgin. The defendant asked her if she wanted to have sex, described the sex acts the defendant would perform, and masturbated for her over the defendant's webcam, which also showed the defendant's face. After she agreed to meet with the defendant, the defendant then drove to her county and was apprehended near the meeting site with condoms. This evidence was sufficient to convict. *Adams v. State*,

312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

State presented sufficient evidence to sustain the defendant's conviction for enticing a child for indecent purposes by unlawfully enticing the victim into a bedroom for the purpose of committing child molestation as a transcript of the victim's interview showed that the defendant had a computer in the defendant's bedroom that sat next to the bed, and when the victim was in another part of the house, the defendant would call the victim into the bedroom and show the victim different porno sites, pictures of naked men, and naked women. *Whorton v. State*, 318 Ga. App. 885, 735 S.E.2d 7 (2012).

There was sufficient evidence to support defendant's convictions for child molestation and enticing a child for indecent purposes based on the testimony of the victim, who stated that when she was 10-years-old, she encountered defendant, who grabbed her arms, forcefully moved her from the stairwell into an empty apartment, and forced her to have vaginal intercourse with him. *Rollins v. State*, 318 Ga. App. 311, 733 S.E.2d 841 (2012).

Evidence was sufficient to support the defendant's conviction for enticing a child for indecent purposes under O.C.G.A. § 16-6-5 since the trial testimony and all reasonable inferences drawn from the testimony were sufficient to support a finding that the defendant enticed the victim to the defendant's residence for purposes of child molestation by giving the victim money. *Moore v. State*, 319 Ga. App. 696, 738 S.E.2d 140 (2013).

Slight movement of the child from the living room sofa to the kitchen table was sufficient asportation to support a conviction for enticing a child for indecent purposes. *Tudor v. State*, No. A12A1676, 2013 Ga. App. LEXIS 226 (Mar. 19, 2013).

Venue.

Based on the allegation that the child enticement was accomplished through an online chat service, venue was not limited to the defendant's physical location at the time the defendant used the service; the state had to prove only that the enticement occurred in White County, and the investigator testified that the investigator

was located in White County when the investigator posed as a child to communicate online with the defendant. *Adams v. State*, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Severance of offenses. — Severance of four counts of child molestation and enticing a child, O.C.G.A. §§ 16-6-4(a)(1) and 16-6-5, was not required because the

evidence regarding the events was not confusing or complicated, and each of the incidents would have been admissible as a similar crime in a trial of the other incidents. *Heck v. State*, 313 Ga. App. 571, 722 S.E.2d 166 (2012).

Cited in *Bolton v. State*, 310 Ga. App. 801, 714 S.E.2d 377 (2011); *Cosmo v. State*, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

RESEARCH REFERENCES

ALR. — Construction and application of U.S. Sentencing Guideline § 2g1.3(b)(3), providing two-level enhancement for use of computer to per-

suade, induce, entice, coerce, or facilitate the travel of minor to engage in prohibited sexual conduct, 58 ALR Fed. 2d 1.

16-6-8. Public indecency.

JUDICIAL DECISIONS

Jail was not public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public place" as required for conviction pursuant

to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). *Singletary v. State*, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

Cited in *Cosmo v. State*, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

RESEARCH REFERENCES

ALR. — Validity of state and municipal indecent exposure statutes and ordinances, 71 ALR6th 283.

16-6-10. Keeping a place of prostitution.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Evidence insufficient for conviction. — In a trial for keeping a place of prostitution, in violation of O.C.G.A. § 16-6-10, a search warrant affidavit, which contained hearsay statements from a neighborhood group purportedly linking defendant's residence to prostitution, was not admissible as original evidence to ex-

plain to the jury why the officers were investigating defendant's residence. Given that the case was entirely circumstantial, the remaining competent evidence was insufficient evidence to support the conviction. *Smoot v. State*, 316 Ga. App. 102, 729 S.E.2d 416 (2012).

16-6-11. Pimping.

Law reviews. — For article, “Crimes and Offenses: Crimes Against the Person,” see 28 Ga. St. U.L. Rev. 131 (2011).

16-6-12. Pandering.

Law reviews. — For article, “Crimes and Offenses: Crimes Against the Person,” see 28 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Cited in Cosmo v. State, No. A12A2469, 2013 Ga. App. LEXIS 197 (Mar. 14, 2013).

16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 131 (2011). For article, “Crimes and Offenses: Crimes Against the Person,” see 28 Ga. St. U.L. Rev. 131 (2011).

16-6-13.1. Testing for sexually transmitted diseases required.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

16-6-15. Solicitation of sodomy.

JUDICIAL DECISIONS

Evidence sufficient for conviction. Victim’s testimony was sufficient to sustain the defendant’s conviction for solicitation of sodomy in violation of O.C.G.A. § 16-6-15(a) because the victim testified that the defendant offered to give the victim money for oral sex. Davenport v. State, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

16-6-18. Fornication.

JUDICIAL DECISIONS

Consecutive sentences affirmed. — Trial court did not err by sentencing the defendant to three consecutive 12-month sentences on probation with the first 12 months to be served on house arrest following the defendant’s guilty plea to the offenses of statutory rape, fornication, and battery because the sentence was within the statutory limits and whether to impose consecutive or concurrent sentences for multiple offenses was within the trial court’s discretion. Osborne v. State, 318 Ga. App. 339, 734 S.E.2d 59 (2012).
Merger properly denied. — Trial court did not err in denying the defendant’s request to merge the defendant’s

convictions for statutory rape and fornication for the purpose of sentencing because the defendant waived the issue of whether the offenses should have been merged

when the defendant knowingly and voluntarily pled guilty to each of the crimes. *Osborne v. State*, 318 Ga. App. 339, 734 S.E.2d 59 (2012).

16-6-19. Adultery.

Cross references. — General rule of competency, § 24-6-601.

16-6-22. Incest.

JUDICIAL DECISIONS

ANALYSIS

RELATIONSHIPS
EVIDENCE

Relationships

Adopted sibling. — Trial court erred when the court denied the defendant’s motion to quash the count of an indictment charging the defendant with incest because the defendant did not commit incest since the defendant’s adoptive sister was not a whole blood or half blood sibling; the incest statute does not prohibit sexual intercourse between a brother and an adoptive sister not related by blood. *Smith v. State*, 311 Ga. App. 757, 717 S.E.2d 280 (2011).

Evidence

Evidence held sufficient to convict.
Evidence was sufficient to support the

defendant’s conviction for incest in violation of O.C.G.A. § 16-6-22(a) because the victim testified that the defendant had sexual intercourse with the victim on a frequent basis for over six years, during which time the defendant was married to the victim’s mother; the victim’s cousin testified that the cousin was in the same room during one incident when the defendant and the victim had sexual intercourse. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

16-6-22.1. Sexual battery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION
JURY INSTRUCTIONS

General Consideration

Cited in *Marshall v. Browning*, 310 Ga. App. 64, 712 S.E.2d 71 (2011).

Application

Relationship to federal sentencing.
— In a case in which a defendant pled

guilty to violating 8 U.S.C. § 1326(a) and the defendant objected to a 16-level enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(iii) based on the defendant’s conviction in Georgia of sexual battery of a victim under 16, in violation of O.C.G.A. § 16-6-22.1(d), the common definition of sexual abuse of a

minor included as an element that the conduct be for a purpose associated with sexual gratification. However, the Georgia offense of sexual battery did not include that as an element; therefore, the Georgia crime of sexual battery under § 16-6-22.1 did not substantially correspond to the common definition of sexual abuse of a minor. *United States v. Hernandez-Gonzalez*, No. 5:11-CR-53, 2012 U.S. Dist. LEXIS 14797 (M.D. Ga. Jan. 31, 2012).

Child molestation and sexual battery.

Victim’s testimony that the defendant pulled down the victim’s pants, reached into the victim’s underwear, fondled the victim’s genitals, and touched them with the defendant’s penis was sufficient to support the defendant’s convictions for sexual battery and child molestation. *Reid v. State*, 319 Ga. App. 782, 738 S.E.2d 624 (2013).

Similar transactions evidence properly admitted.

Trial court properly admitted similar transaction evidence during the defendant’s trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant’s age at the time, the evidence was relevant to show the defendant’s lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant’s youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant’s

attempt to conceal the defendant’s behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. *Ledford v. State*, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Evidence sufficient for delinquency adjudication. — Evidence was sufficient to adjudicate the juvenile for felony sexual battery in violation of O.C.G.A. § 16-6-22.1; the juvenile court was faced with sufficient evidence to find that the juvenile was responsible for a sexual battery against the victim, who was a classmate of the defendant’s and under the age of 16, by intentionally making unwanted physical contact with the victim’s breast; the juvenile court was faced with conflicting testimony as to what occurred between the victim and the juvenile, and conflicts in the testimony were a matter of credibility for the trier of fact to resolve. In the *Interest of D.D.*, 310 Ga. App. 329, 713 S.E.2d 440 (2011).

Jury Instructions

Charge on sexual battery not warranted. — Although some evidence showed that the defendant, convicted of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), touched the victim’s vagina without penetration, the defendant was not entitled to a jury instruction on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1 because the defendant’s defense was that the victim fabricated her claims. *Smith v. State*, 310 Ga. App. 392, 713 S.E.2d 452 (2011).

16-6-22.2. Aggravated sexual battery.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION
JURY INSTRUCTIONS
SENTENCE

Application

Admissibility of evidence of similar offenses.

Trial court did not err in admitting

similar transaction evidence because certified copies of the defendant’s prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, ag-

gravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Evidence sufficient for conviction, etc.

Evidence was sufficient to support the defendant's convictions for rape, O.C.G.A. § 16-6-1(a)(1), statutory rape, O.C.G.A. § 16-6-3(a), aggravated sexual battery, O.C.G.A. § 16-6-22.2(b), aggravated sodomy, O.C.G.A. § 16-6-2(a)(2), child molestation, O.C.G.A. § 16-6-4(a)(1), and aggravated child molestation, O.C.G.A. § 16-6-4(c) because the evidence not only included the victims' testimony, which was both direct evidence of their own molestation and similar transaction evidence of the other's abuse, but also included the testimony of outcry witnesses and recordings of the forensic interviews of both victims. *Williamson v. State*, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Physical evidence of the trauma to at least one victim, together with the consistency of the victims' statements to the outcry witnesses, law enforcement, and the forensic interviewer, the similar transaction testimony, and the evidence showing opportunity sufficed to establish each element of the charges of aggravated sexual battery and child molestation. *Tudor v. State*, No. A12A1676, 2013 Ga. App. LEXIS 226 (Mar. 19, 2013).

Aggravated sexual battery and child molestation merged. — Charges of aggravated sexual battery and child molestation, O.C.G.A. §§ 16-6-22.2(b) and 16-6-4, respectively, were indistinguishable because all of the averments, including the date, the victim, and the description of the defendant's conduct constituting the offense, were identical. The charges should have merged for sen-

tencing. *Hudson v. State*, 309 Ga. App. 580, 711 S.E.2d 95 (2011).

Expert testimony. — With regard to defendant's conviction for child molestation and aggravated sexual battery, the trial court did not err by denying the motion for mistrial or motion for new trial based on the testimony of a forensic interviewer following the child victim's outcry in court about testifying because the forensic interviewer provided only general testimony concerning child abuse accommodation syndrome and the behaviors abused children often exhibit as a result of having been abused and did not testify that in her opinion the victim had been abused or that her inability to take the stand to testify against defendant was a result of having been abused by defendant. *Canty v. State*, 318 Ga. App. 13, 733 S.E.2d 64 (2012).

Jury Instructions

Jury charge proper.

Instruction that the defendant could be convicted of aggravated sexual battery by penetrating the sexual organ or the anus, when the indictment alleged penetration of the vagina, was not erroneous because the jury was instructed the jury could only convict the defendant for offenses charged in the indictment. *Brown v. State*, 315 Ga. App. 115, 726 S.E.2d 612 (2012), cert. denied, No. S12C1239, 2012 Ga. LEXIS 983 (Ga. 2012).

Charge on lesser offense not warranted. — Although some evidence showed that the defendant, convicted of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), touched the victim's vagina without penetration, the defendant was not entitled to a jury instruction on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1 because the defendant's defense was that the victim fabricated her claims. *Smith v. State*, 310 Ga. App. 392, 713 S.E.2d 452 (2011).

Sentence

Sentence excessive.

Trial court erred by resentencing the defendant to a more severe sentence on remand following the merging of the defendant's convictions for aggravated sexual battery and child molestation because

under the count-by-count approach, the probationary period of the defendant's sentence was less, but the defendant's prison sentence was increased by 15 years. *Hudson v. State*, 318 Ga. App. 54, 733 S.E.2d 360 (2012).

Registration properly required. — Trial court properly convicted the defendant of failing to register as a sexual offender under O.C.G.A. § 42-1-12(e)(4) because the statute was not unconstitutionally vague absent the definition of the term sexually violent offense as it included offenses in violation of O.C.G.A. § 16-6-22.2 and the defendant admitted the defendant knew the defendant was required to register. *Youmans v. State*, 291 Ga. 754, 732 S.E.2d 441 (2012).

Merger. — Defendant's child molestation conviction under O.C.G.A. § 16-6-4(a) did not merge under O.C.G.A. §§ 16-1-6(1) and 16-1-7(a) into the defendant's aggravated sexual battery conviction under O.C.G.A. § 16-6-22.2 as the child molestation charge required proof that the defendant committed an immoral and indecent act with the intent to arouse and satisfy the defendant's sexual desires, whereas the aggravated sexual battery charge did not, and the aggravated sexual battery charge required proof of penetration, whereas the child molestation charge did not. *Gaston v. State*, 317 Ga. App. 645, 731 S.E.2d 79 (2012).

